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A

SYSTEM

OF THE

LAWS

OF THE

STATE of CONNECTICUT.

IN SIX BOOKS.

By ZEPHANIAH SWIFT.

VOLUME I.

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ADARCHIVE

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A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

INTRODUCTION.

Of Law and Government.

SECTION FIRST.

PRELIMINARY OBSERVATIONS.

EVERY citizen in the ſtate, ought to acquire a knowledge of thoſe laws, that govern his daily conduct, and ſecure the invaluable bleſſings of life, liberty and property. The beſt method to diffuſe this knowledge thro all ranks, is to ſimplify, and ſyſtematize the laws. No country is favored with a more perſpicuous code than the ſtate of Connecticut; yet in no country is it more arduous and difficult to obtain a ſyſtematic underſtanding of the law. The cauſe of this ſingular inconvenience merits particular inveſtigation.

The common law of England is obligatory in this ſtate by immemorial uſage, and conſent, ſo far as it correſponds with our circumſtances and ſituation. As we have no treatiſe upon our laws, we are under the neceſſity of becoming acquainted with the Engliſh code for the purpoſe of underſtanding our own. The operation of the Engliſh common law, is aſcertained by no general rule, and is bounded by no known line: it can be learned only from the deciſions of our courts. A common law peculiar to ourſelves, reſulting from our local circumſtances, has been eſtabliſhed by the deciſion of our courts; but has never been committed to writing. A difference in the form of the government, the manners of the people, and the circumſtances of the country, furniſhed caſes to which the com-

mon law could not be ſuppoſed to extend, and rendered neceſſary the introduction of ſtatutes to ſupply the defect, and compleat the ſyſtem of juriſprudence.

From this repreſentation, it is eaſy to imagine the great labor, and difficulty of becoming thorough maſters of our laws. The ſtudent muſt wander through the wide field of Engliſh juriſprudence, without a guide to direct him in the way. Having acquired much uſeleſs learning, in becoming acquainted with that voluminous code, he finds himſelf forever embarraſſed with doubt and uncertainty, for want of ſome general rule, to determine what part of it has been approved of, and adopted by his own country. When he directs his enquiries to aſcertain the common law, introduced by the deciſions of our own courts, he can find it only in oral tradition, and the tranſient memory of judges and lawyers. The alphabetical arrangement of the ſtatutes, renders it a laborious effort of the mind, to acquire a ſyſtematic knowledge of them by reading and ſtudy. This evidences that the only method of obtaining a knowledge of that ſcience, which furniſhes rules to which we are conſtantly bound to conform our conduct, is by a long attendance on court; and this points out the neceſſity and importance of a treatiſe, that contains a full account of the inſtitutions of our country.

Theſe conſiderations have induced the author of this work, to make the following methodical compilation, for the purpoſe of remedying theſe inconveniences, and unfolding the beautiful ſimplicity of our excellent ſyſtem of juriſprudence. The plan he has adopted is to exhibit a compleat ſyſtematic view of our conſtitution and laws: to ſelect and extract from the common law of England, that portion of it which has been received and approved from time immemorial, and has become valid and binding in this ſtate: to collect, and arrange in proper order, thoſe principles and doctrines, which have become law by the uſage and practice of the people, and the deciſions of courts: and with theſe to interweave and connect the poſitive regulations introduced by ſtatute. This plan is intended to afford the ſtudent the ſatisfaction and delight of arranging his ſtudies in proper method, of extending his mind at one view thro all the various branches of juriſprudence, of beholding the connection

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and mutual dependence of all the parts, and of comprehending the beautiful order, and ſymetry of the whole.

Not only the ſtudent may be aſſiſted by a work of this kind, if well executed; but many other perſons may derive eſſential advantage from it. No gentleman ought to conſider his education compleated till he has gone through a courſe of ſtudies upon the laws of his country. In the preſent ſtate of this ſcience, but few have leiſure to acquire the knowledge of it, and fewer have fortunes ſufficient to purchaſe the neceſſary books. This work is intended to furniſh a man, who does not follow the profeſſion, with ſufficient knowledge of the law, for the purpoſes of contemplation, and amuſement, and the ordinary buſineſs of life. There are many perſons who are honored by the ſuffrages of their fellow-citizens, with ſeats in the legiſlature, who by reaſon of their employments, cannot be acquainted with our laws, in their preſent unweildy voluminous ſtate. Yet they are ill qualified to be legiſlators, without ſome knowledge of the fundamental principles of law, and the nature and extent of government. There are but few perſons who are not frequently in the courſe of their lives called upon to decide upon the rights, and even upon the lives of their fellow-citizens as jurors. In this ſituation they are obliged to form judgments upon points of great importance and nicety, that require a conſiderable ſhare of knowledge. This treatiſe is intended to furniſh ſuch perſons with the information neceſſary for the faithful diſcharge of ſuch important truſts.

But there is no order of men who can receive more beneſit from ſuch an undertaking as the preſent, than thoſe who have the honor to hold commiſſions of the peace. Their extenſive juriſdiction in criminal caſes, and their power of trying matters of a civil nature, frequently render it neceſſary for them to determine queſtions of as much intricacy and nicety, as any that come before the higheſt courts. But few of them from their ſituation in life, can pay that attention to the ſtudy of the law, by which in its preſent ſtate they can acquire the knowledge neceſſary to qualify them to fill their places with dignity and reſpectability. The conſequence is, that their erroneous determinations render them contemptible, and their ignorance ſubjects them to the impoſitions of the artful and deſign-

ing. Unſkilled in the mere formality of making entries of their proceedings and judgments, their records often furniſh abundant matter of ridicule, when expoſed to public view in writs of error brought to the ſuperior court. To furniſh juſtices of the peace with a plain treatiſe, by which they can with facility acquire the information requiſite to qualify them to diſcharge the duties of their office with honor, and adminiſter juſtice with impartiality, is the moſt important object of this work.

But it is not expected that thoſe gentlemen who move in the higher ranks of judicature, or who are immediately converſant in the practice of the law, will derive any benefit from theſe diſquiſitions. Their benevolence and patriotiſm will induce them to encourage an undertaking that is calculated to diſſeminate uſeful knowledge, and augment the happineſs of the people.

To every citizen of Connecticut, nothing can afford a more heart-felt delight than the conſideration, that in no country on the globe, is there a more general diffuſion of knowledge among all claſſes of people.—The univerſal attention paid to education, has laid the permanent foundation of a general taſte for ſcience and reading.—The various branches of literature by means of ſyſtematic treaties are within their reach: but the juriſprudence of the country is ſurrounded by ſuch thick clouds of technical jargon and abſtruſe learning, that it is inacceſſible to the maſs of the people. To diſſipate the darkneſs which has ſo long veiled this intereſting ſcience, and to diſcloſe to the people a full view of thoſe rules which govern their daily conduct, is the great object of this work. All that technical intricacy which has ſo long diſfigured the ſcience of juriſprudence, will be avoided, and our laws ſimplified and ſyſtematized, will be preſented in a form intelligible to every capacity. A treatiſe calculated for this purpoſe is all that is now neceſſary to diſſeminate, as large a ſhare of general and uſeful knowledge, as can be acquired by the body of the people. A republican form of government will then have the faireſt chance to be put to the teſt of experiment. We ſhall be able to aſcertain what portion of political happineſs, a people are capable of attaining when they are well informed, and the quantity of civil liberty which is compatible

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with that energy in government which is neceſſary to preſerve the peace and good order of the community. Thoſe gentlemen who have a reliſh for literature, may purſue their enquiries reſpecting the laws of their country with as much facility and amuſement, as they can the other branches of ſcience, while a complete view and accurate delineation of our legal code, will render its ſuperior excellence the object of general admiration and regard.

In accompliſhing this work, the author has followed the practice of all writers on this ſubject. He has not ſcrupled to take advantage of the writings of all who have preceeded him, and the plans and methods which they have adopted. The merit of the performance depends upon its being a faithful digeſt, and accurate compilation of principles already known and eſtabliſhed, and not on new and origininal obſervations and diſcoveries. Far more delightful would it be to indulge the mind in wandering into the regions of fancy, and in exploring the fields of ſcience, to ſelect the moſt pleaſing and ſplendid topics for diſcuſſion and illuſtration. But I muſt adopt the language of an eminent reporter; [a] "The nature of the "undertaking precludes that ſort of ambition, by which authors are "ſo often animated, and my utmoſt aim will be attained, if I ſhall "be found in any degree to have merited the humble praiſe of "uſeful accuracy: ubi ingenio non erat locus, curæ teſtimonium "promeruiſſe contentus."

SECTION SECOND.

OF LAW IN GENERAL.

LAW, in the limited ſenſe in which we are to conſider it in the courſe of our diſquiſitions, is the rule of human conduct in a ſtate of ſociety. But in its moſt extended ſenſe it may be defined to be a rule of action, applicable to animate and inanimate nature, and comprehending all the general principles of action, that are eſtabliſhed in the ſyſtem of the univerſe. To obtain a clear idea of the import of this term in its various and qualified meanings, we muſt ſurvey that ſyſtem of things from which laws originate, and in which they are eſtabliſhed.

Philoſophical

[a] Doug 8.

Philoſophical diſcoveries have unfolded to mankind the magnificent and ſumblime idea, that univerſal ſpace is adorned with innumerable ſyſtems of worlds—that all the ſtars like our ſun, are ſuns to planetary ſyſtems—that the planets perform regular revolutions in their orbits, and are peopled by an infinite variety of inhabitants. Theſe ſyſtems again perform one grand revolution around a common center, the center of Infinity, the throne of the Supreme Intelligence, the great firſt Cauſe—where his almighty power communicates life and motion to all nature, where his omniſcient eye contemplates the ineffable glories of his works, and his boundleſs benevolence derives immeaſureable delight, from diffuſing infinite felicity to innumerable ranks of being; while the muſic of the ſpheres reſounds a perpetual ſong to his praiſe.* This glorious repreſentation of univerſal nature, exhibits the moſt exalted view of the tranſcendent excellence and boundleſs power of the Supreme Deity, whoſe almighty fiat called all worlds into exiſtence, and impreſſed upon them thoſe general and immutable laws, that will regulate their operation through the endleſs ages of eternity. The Supreme Being whoſe attributes are infinite power, wiſdom and goodneſs, has formed this ſyſtem upon the moſt perfect plan. He diffuſes the greateſt poſſible happineſs, and diſtributes impartial juſtice to all intelligent and rational creatures—Tho our imperfect natures diſqualify us, to reconcile all events that come within our knowledge, to the attributes of the Deity; yet if we could ſcan the univerſe, and diſcover the final reſult of all things, there is no doubt but that we ſhould be delighted at the glorious manifeſtations of juſtice, and the liberal diffuſion of felicity. The Deity having from all eternity, eſtabliſhed the general laws that will operate with invariable certainty through all eternity, he is capable of foreſeeing all events, that will take place, and of courſe, all things paſt, preſent, and to come, are forever in the view of his omniſcient mind.

Theſe

* Aſtronomers have diſcovered that the ſtars which are commonly ſuppoſed to be fixed, have a regular motion, which renders it probable, that they have a revolution round a common center. The preceſſion of the equinoxes can better be accounted for on this hypotheſis, than any other. The idea of the muſic of the ſpheres originated with Pythagoras, and probably was ſuggeſted by his ſingular theory of philoſophy, that the firſt principles of things conſiſted in the harmony of numbers. Upon this idea, he has erected the moſt fanciful fabric of philoſophy of any of the ancients. A contemplation of the revolution of all the planetary ſyſtems round a common center, accompanied by the muſic of the ſpheres, unfolds the moſt elevated and tranſcendent idea of the ſupreme character.

Theſe general laws reſulting from the original principle and fitneſs of things, and applicable to animate and inanimate matter, and rational and irrational beings, are denominated the laws of nature. The limited ſtate of our faculties, renders it impoſſible for us to obtain a clear diſcovery of the infinite extent and univerſal operation of thoſe laws. A full proſpect of the glories of nature and a knowledge of the ultimate cauſe of things, muſt be hid from us, till our intellectual faculties are enlarged in ſome future ſtate of exiſtence. The aſtronomer has diſcovered the agency of gravitation in effecting the revolution of the heavenly bodies. The philoſopher has inveſtigated the laws of motion, the mechanical powers, the laws of optics, fluids, and electricity. The chemiſt has demonſtrated that the compoſition and decompoſition of material ſubſtances, are cauſed by the power of attraction, of coheſion, and repulſion. Theſe, and many more which it is not my province to enumerate, conſtitute the laws of nature that reſpect the material world.

Man, who is the ſubject of theſe enquiries, is a compound being, conſiſting of matter and mind. The generation, organization, nutrition and exiſtence of the material part, depend upon the ſame laws, as matter. The mind ennobles him with the higheſt priviledges and excellencies, and renders him capable of ſenſation.—By means of the ſenſes he obtains a knowledge of the beauties of nature with which he is ſurrounded—Endowed with reaſon, he is capable of thinking, and judging reſpecting the ideas communicated to him by his ſenſes—Suſceptible of the feelings of pleaſure and pain, he is rendered an active being and impelled by a thouſand motives, to ſhun the various ſcenes of miſery, and purſue the fleeting objects of happineſs. In this purſuit, his mind is under the influence and government of thoſe motives which reſult from the eſtabliſhed order of things; but as he feels that he has the power of doing as he pleaſes, he conſiders himſelf to be a free agent and reſponſible for his conduct. Inveſted with a conſcience or moral ſenſe, he is qualified to diſtinguiſh between right and wrong, and aſcertain the boundaries between virtue and vice. This monitor enthroned in his heart, furniſhes him with the tranſport of ſelf approbation, when he purſues the path of virtue and points

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the dagger of horror and remorſe to his ſoul, when he obeys the allurements of vice. Man as a moral agent, is ſubject to thoſe moral laws which are co-exiſtent with eternity, and which are calculated to produce the higheſt poſſible happineſs in this ſtage of our exiſtence. Theſe laws are equally operative and obligatory upon the whole human race; and tho there may be ſome ſlight variations, occaſioned by difference of climate and education; yet ſuch is the agreement of mankind in reſpect to them, that they may be ſaid to be general in their extent, and univerſal in their operation. Yet as man was not intended in the commencement of his exiſtence, to be a perfect being, but to progreſs from ſtage to ſtage, towards perfection, till he ſhould become qualified for complete felicity, and a full comprehenſion of the glories of his creator, we find that he is ſometimes actuated by miſchevious propenſities and wicked deſires, that impel him to a violation of the moral law, and the commiſſion of injuries to his fellow-creatures. If ſome permanent principle were eſtabliſhed, that coerced mankind to a perpetual obſervance of the moral law, they would be in a ſtate of peace and ſafety, but the imperfect obſervance of it, has expoſed them to every ſpecies of danger, inſult, and injury, and has rendered neceſſary for their preſervation, that ſocial principle which is wiſely implanted in the human mind.

Man when alone, is a feeble defenceleſs being—incapable of aſſerting his rights, and redreſſing his wrongs. The Deity has therefore inſtamped on his nature the love of his fellow men, inveſted him with ſocial feelings, and impelled him by the ſtrong principle of ſelf-preſervation, to enter into a ſtate of ſociety. The inſtant we contemplate man as a ſocial being, we behold the germination of that principle that prompts him to adopt and obſerve thoſe rules and regulations which are neceſſary to ſecure the rights of individuals, and preſerve the peace and good order of ſociety. Thoſe rules conſtitute the civil law, and are the ſubject of theſe reſearches. A more complete and accurate definition will be given of law, as ſoon as we have conſidered civil ſociety, and civil government.

Such is the extent of the globe, that it is impracticable to unite all mankind under one government. A number of diſtinct and independent

dependent communities have been erected. Their relation to each other is the ſame as that of individuals in a ſtate of nature. Where a community has ſuſtained an injury from another, it muſt be its own judge with reſpect to the recompence to be demanded, and muſt depend on its own reſources to procure redreſs. In the intercourſe of nations, by common and univerſal conſent, certain general rules and principles have been adopted, that are founded on the law of nature, and denominated the laws of nations.—*a* This is defined to be the ſcience of the law ſubſiſting between nations or ſtates, and of the obligations which flow from it. *b* Juſtinian ſays, "the law of nations is common to the whole human race." The exigences and neceſſities of mankind, have induced all nations to conſtitute certain rules of right.

When man opens his eyes upon the wonderful, ſublime and magnificient objects that ſurround him, he is convinced that there is ſome ſupreme intelligent power that called them into exiſtence, and that governs univerſal nature. A conſciouſneſs of his own weakneſs and dependance, the pain and miſery to which he is ſubjected, lead him to implore the mercy and favour of the inviſible power by the fragrant incenſe of ſacrifice, by the humble ſtrains of adoration, or the pious ſupplications of a penitent heart and contrite ſpirit. Man is a religious being. In every ſtage of ſociety, and in every country on the globe, this truth has been demonſtrated. From the Tartar who roams through the wilds of Aſia, and the Indian who traverſes the woods of America, to the philoſopher who with his teleſcope ſurveys the ſtellary worlds, or in his labaratory, explores the occult qualities of matter, the power of religion encreaſes, in proportion to the encreaſe of knowledge. Human laws, can neither create or annihilate it. Mankind will never ceaſe to be religious, till they ceaſe to exiſt. It would be a curious ſubject to inveſtigate the wild ſyſtems of mythology, which have been adopted by nations guided by the light of nature, unaided by divine inſpiration. But it is ſufficient for our purpoſe to remark, that in this country we have the bleſſing of a religion, that while it opens the door of ſalvation, and guides to immortal felicity, is ſupported by ſuch indubitable proof, that we muſt diſregard human teſtimony,

a Vattel, Law of Nations, 2. *b* Jus autem gentium omni humano generi commune eſt, nam uſu exigente et humanis neceſſitatibus gentes humanæ jura quædam ſibi conſtituerunt. Juſt. Inſt. L. I. T. 2.

and reject the evidence on which all our knowledge of paſt tranſactions is grounded, if we doubt its truth, or deny its divinity. The chriſtian religion derives the higheſt credibility from containing a ſyſtem of morality, infinitely ſuperior in point of excellence and purity, to the theology of Greece and Rome, and the philoſophy of Plato and Cicero. From this religion, is derived the revealed or divine law, and the obſervation of it, is ſanctioned by future rewards and puniſhments.

Section Third.

OF CIVIL SOCIETY.

WE have conſidered man as a ſentient, rational, active, and moral being. We are now more eſpecially to conſider him in his ſocial capacity. To obtain a thorough knowledge of this ſubject, it is neceſſary to view mankind when connected with each other, but independent of any government; which political writers call a ſtate of nature.

It cannot be expected that we can find any nation in a ſtate of nature, tho ſome ſavage clans and tribes, are but little removed from it. But for the purpoſes of the preſent enquiry, it is immaterial whether this ſtate be ideal, or actually exiſting. We can eaſily imagine what mankind would be, in ſuch a ſtate, and thence infer their rights and privileges.

In a ſtate of nature, all men poſſeſs the ineſtimable privilege of freedom. They are equal in point of rank. They know no diſtinction, but what ariſes from ſuperiority of bodily ſtrength, and intellectual capacity. They are bound to yield obedience to the commands of no ſuperior, and to conform their actions to the laws of no government. The moral law only, has any obligation upon them, and to this they owe the moſt perfect obedience. They have an indiſputable right to do every act which they pleaſe, in the purſuit of their own happineſs, that does not contravene the moral law, nor injure any of their fellow creatures. The rights of perſonal ſecurity, perſonal liberty, and private property, they are entitled

entitled to in their fulleſt extent. When any perſon ſuſtains an injury, he appeals to no tribunal for redreſs, he is the ſole judge of the injury, tho his own caſe; his own arm avenges the wrong, and chaſtiſes the offender. If mankind were under the perpetual influence, and invariable direction of the moral law, how happy would their ſituation be in a ſtate of nature: there would be no neceſſity of the interpoſition of human laws. But while conſcience dictates to them to purſue the paths of virtue, and warns them againſt the practice of vice, there are many individuals who are actuated by certain propenſities, to wrong their fellow-men, and infringe the rules of morality. To check, reſtrain and puniſh this injuſtice, every individual is left to the ſtrength of his arm, and the powers of his mind. So great is the difference among mankind in this reſpect, that the conflict is very unfair and unequal. The weak will always fall a prey to the ſtrong; the cauſe of juſtice will be diſregarded, the powerful will triumph in the practice of miſchief, and injuſtice,—the weak muſt ſuffer a conſtant repetition of injuries without a poſſibility of redreſs. This points out the miſerable condition of man in a ſtate of nature, and we may rationally expect to find him endowed with ſome principle to ſupply the defect.

Why immutable laws were not inſtamped upon the mind of man, that ſhould certainly direct him to a courſe of conduct productive of the greateſt poſſible happineſs, is a myſtery far beyond human comprehenſion. It is however probable, that in the ſyſtem of nature, and in the eternal plan conceived in the divine mind, for the diſplay of his glory, it became neceſſary to create ſuch an order of beings as man, to compleat that infinite variety that diſtinguiſhes the works of creation. He is endowed with all the principles that are neceſſary to conſtitute his character. While he applauds the practice of virtue, we find that the unguarded impulſe of paſſion, the proſpect of temporary pleaſure, or the inclination of a wicked heart, may lead him to do wrong to his fellow creatures, and diſturb their peace and repoſe. But leſt this perpetual warfare ſhould put an end to the human race, they are inſpired with a love for each other, and are endowed with principles, that lead to unite in ſociety for mutual protection, and defence. The mutuality of affection between individuals, the fear of danger, the

incapacity of defence, and the wants which they cannot ſupply, in a ſtate of nature, induce them to aſſociate together, and may be conſidered as the baſis of civil ſociety.

A ſtate of ſociety when contraſted to a ſtate of nature, muſt not be conſidered as merely artificial, and therefore unnatural. The truth is, that the ſocial ſtate is perfectly congenial to the feelings of the human heart. Man is a gregarious animal, and the principles of his nature lead him to the formation of ſocial connexions.

The act of uniting in ſociety, is called *the* original compact, or ſocial contract, and is ſuppoſed to be a voluntary agreement between individuals, by which they form the conſtitution of government, and ſecure the enjoyment of political liberty, and the purſuit of private happineſs. Governments that have been eſtabliſhed by force do not admit of this idea : but ſuch is the origin and foundation of all free governments, tho generally it is impoſſible to find any records of the formation of the ſocial compact. In America however, many inſtances of that nature have taken place. At the diſſolution of our connexion with Great-Britain, tho we could not be literally ſaid, to be in a ſtate of nature, yet the ſtates which had been directly dependent on the Britiſh crown, were ſo in a political point of view, and they proceeded to enter into ſocial compacts, and adopted conſtitutions for their government. The conſtitution of the United States, is the moſt illuſtrious example of a government founded on the voluntary contract of the people, that the page of hiſtory has ever recorded.

Mankind when they enter into a ſtate of ſociety, reſign to the community a certain portion of their natural liberty, to acquire civil liberty. They reſign a part of their natural rights, to acquire ſocial rights. Natural liberty conſiſts in a man's having the power to do whatever he pleaſes, uncontrouled by any ſuperior, and regarding only the moral law. Civil liberty, conſiſts in a perſon's having the power to do whatever he pleaſes, conſiſtent with the laws to which he has voluntarily ſubjected himſelf.—The object of a man in ſurrendering to the community any portion of his natural liberty, is to obtain compleat protection and ſecurity for political liberty. He does not therefore conſent to the

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impoſition of any other reſtraint upon his conduct by the government, than what is neceſſary to ſecure and preſerve his ſocial rights.

We may therefore eſtabliſh it as a maxim in legiſlation, that the rule to be adopted in enacting laws, muſt be to reſtrain no acts but thoſe which tend to the injury of individuals and the diſſolution of government. Every law that deviates from this rule, is arbitrary and unjuſt, and reduces the people to political ſlavery. Every government that adopts this rule ſecures to the ſubjects political liberty.

Every citizen owes obedience to the laws of the ſtate, and is entitled to protection and ſecurity in his life, liberty, and property. The duties of protection and allegiance, are reciprocal.

Where civil government is once formed by the operation of natural principles, we find its ſupport is derived from the ſame ſource. Man will as ſoon put an end to his exiſtence, as withdraw himſelf from ſociety, or ceaſe to maintain it. The all-wiſe creator, has given mankind feelings that lead them to perform the courſe of conduct which he has deſigned. Theſe principles reſult from the neceſſary conſtitution of things. Man when alone is feeble and defenceleſs, incapable of protecting and defending himſelf. He is conſtantly alarmed with fears of danger, and ſurrounded with wants which he cannot ſupply. But when individuals unite together, they become capable of mutual protection, and defence, and of ſupplying all their wants. From the combined and collected ſtrength of the whole community, each individual derives a ſecurity, which he cannot obtain when alone and ſeparate. The ſtrongeſt of all motives, therefore, ſelf intereſt and ſelf preſervation, co-operate to ſtrengthen the bands of ſociety. The happineſs of men depend upon their connexion and union with their fellow creatures. Man baniſhed from ſociety is a miſerable, melancholy being. In the company and converſation of his friends, he obtains all the pleaſure that renders life worth enjoying. We muſt eradicate from the human heart, the deſire of happineſs before man will ceaſe to adhere to the community.

Political writers have generally entertained an idea, that men when they enter into a ſtate of ſociety, ſacrifice, or give up to the

community ſome portion of natural rights, to acquire protection and ſecurity for the remainder. A late writer on government whoſe talents command our reſpect, and whoſe exertions to communicate juſt ſentiments reſpecting government, merit our approbation, has pointed out the error of this general propoſition, and has advanced the principle, [a] "that the rights of man are relative to his ſocial "nature, and that they exiſt only in a coincidence with the rights "of the whole, in a well ordered ſtate of ſociety, and civil gov-"ernment: [b] that ſociety in the adminiſtration of right, grants "nothing to any of its members, and that every man is a propri-"etor, and draws on the capital as matter of right." His opinion ſeems to be, that man makes no ſacrifice when he enters into the ſocial ſtate, and that it is congenial to his nature.

The poſition that when men enter into the ſocial ſtate, they give up ſome portion of natural right, to acquire ſecurity for the remainder, is manifeſtly erroneous. To ſuppoſe that men by uniting in ſociety, only obtain ſecurity for the rights they have reſerved, is contrary to fact. To ſay that our natural and our ſocial rights are the ſame, perhaps, is not perfectly correct. Some confuſion probably has ariſen with reſpect to this ſubject, from not annexing accurate ideas to the words, which have been uſed. To contraſt the ſocial ſtate, to the natural ſtate, as tho the former was artificial, and the latter natural, is contrary to truth. No principle of human conduct, is more perfectly natural than that which prompts mankind to aſſociate together for mutual benefit. The words ſocial, and natural, are not therefore to be conſidered as deſignating oppoſite ſtates, in which mankind are placed. They are only to be conſidered as two diſtinct ſtates in which they may be contemplated to aſcertain the rights and character of man.—I doubt whether a ſtate of nature ever did, or can exiſt; but I can imagine ſuch a ſtate, and thence infer the advantages derived from a union in ſociety.

In a natural ſtate, the moral law would be the only rule of conduct. Admitting that mankind would pay a compleat regard to that law, what would be the conſequence? It is eaſy to obſerve that they would not remain like ſome ſavage tribes, in a rude uncivilized

[a] Chapman's principles of government, 77. [b] Ibid. 112.

civilized ſtate: nor would they live alone unconnected with each other. They would build towns and cities, improve in agriculture, manufactures, and commerce, and obtain all the pleaſures of ſociety. There would be no neceſſity of a code of laws to regulate their conduct, or of a government to carry them into execution. They would be able to attain under the invariable influence and direction of the moral law, all that happineſs which could be attained in a well regulated government. Human induſtry, unſhackled by laws, might be exerted in every direction, and extended to the higheſt point of improvement. There would be no reſtraint upon the conduct of man, but the moral law.

But ſuppoſing, that men would not pay a perfect obedience to the moral law, and yet did not carry their injuſtice to an extreme, which required the ſtrength of government to ſuppreſs it. The conſequence would be, that whenever an individual ſuſtained an injury from the miſconduct of another, he would have a right to be his own judge, to aſcertain the recompence to which he is entitled, and the ſtrength of his own arm muſt carry his decree into execution: he would be bound however to govern his judgment by the principles of moral juſtice.

But on actual experiment, it is found that men will not regard the dictates of the moral law, and that individual ſtrength is inſufficient to repel the violence of injuſtice. It is therefore impracticable for them to exiſt in a ſtate of nature, and they are under the neceſſity of combining together for mutual protection and defence. This is the operation of a natural principle. But when men have arrived to the ſocial ſtate, when they have adopted a civil government, how are their rights varied from what they are in the natural ſtate? Every individual gives up the right of judging in his own caſe, and avenging his own wrong, to the community. In this reſpect, natural right is varied. In conſequence of this he acquires from the community, a right that his claim for the reparation of any injury, he has ſuſtained, ſhall be aſcertained by known and juſt principles, and that the whole ſtrength of the community ſhall be exerted to do him juſtice. This is a right which he had not in a ſtate of nature. It is a right which he acquires as a mem-

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ber of ſociety. In a ſtate of nature, no man is bound to aid and aſſiſt another in the proſecution of juſtice, or the defence of his rights unleſs he pleaſes. But in the ſtate of ſociety, every individual becomes obliged to exert his ſtrength, in obedience to the order of the community, for the benefit of an individual, or for the preſervation of public tranquility.

Every member of the ſociety ſubmits to numerous reſtraints upon his conduct, which are not required by the moral law, or in the natural ſtate, for the purpoſe of veſting in the hands of government, the power of furniſhing him compleat ſecurity and protection.—We ſubmit to many formalities reſpecting contracts, which are the offspring of poſitive, and not of natural law, to render our property ſecure. We conſent to be reſtrained from doing many acts which are innocent in themſelves, and to be obliged to do many acts which the natural ſtate does not require, to obtain compleat protection for the rights we mean to enjoy. In conſequence of this, we acquire many rights, and advantages of a civil nature, which could not be obtained in the natural ſtate. Hence it is evident that there is a diſtinction between natural and civil rights, as they may be called more properly, than ſocial, becauſe a perſon may enjoy ſocial rights, in what is properly called a ſtate of nature. Natural and civil rights cannot be enjoyed at the ſame time. We muſt give up the one to attain the other. But the natural rights which we ſacrifice, are of but very little value, when compared with the civil rights we acquire in a free and well regulated government. Indeed they are of little value, becauſe they are difficult to be exerted, but the civil rights are of immenſe value, and are capable of being realized.

This leads us to a correction of that opinion which has been maintained by ſo many philoſophers, that men reſign part of their natural rights, to obtain ſecurity for the remainder, by ſubſtituting the propoſition that men give up to the community, a part of their natural rights to acquire civil rights. From this ſame principle it follows, that the opinion that ſociety in the adminiſtration of right, grants nothing to any of its members, is not well founded. For in the civil ſtate, which is deemed the ſame as the ſocial ſtate, by the

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adminiſtration of the government, the members do acquire certain poſitive rights, which they can enjoy only in a civil ſtate, and which are therefore to be conſidered as the gift and the offspring of ſocial inſtitutions. It is in virtue of his being a member of the ſociety, that a man is a proprietor, and has a right to draw on the capital, and not in virtue of any natural right.

Men at their birth are all veſted with equal rights, but are endowed with unequal powers. There is a great difference between their intellectual, as well as corporeal faculties, which is the origin of the inequality of mankind. The man who has ſuperior ſtrength of body, or powers of mind, muſt take a correſpondent rank in ſociety. The man who poſſeſſes uncommon talents for accumulating property, will grow rich, while the oppoſite character, with equal advantages will remain poor. Thoſe who are bleſt with the powers of eloquence, or talents to render them diſtinguiſhed in the various branches of literature, will acquire a fame that cannot be reached by men of moderate capacity. Hence in the nature of man, we find the foundation of that difference of condition, which is every where eſtabliſhed. There is a gradation in human powers from the higheſt to the loweſt, which has produced a correſpondent gradation in the ranks of ſociety. But whether men poſſeſs the greateſt, or the ſmalleſt talents, they have equal claims to protection, and ſecurity in their exertions, and acquiſitions.

It is idle to lay it down as a general propoſition that all men are born equal. It is contrary to the truth of the fact, and the deſign of the creator. The difference of genius by which they are qualified for different occupations, is eſſential to the exiſtence, and conformable to the nature of man. But the real misfortune is, that this natural inequality among mankind, has been directed to eſtabliſh an artificial inequality, which has been the ſource of ſerious evils, and complicated inconveniences. The eſtabliſhment of hereditary honors and privileged orders among the nations of Europe, and the diviſion of the Hindoos, into four tribes, or caſts in Aſia, by which birth, and not ſuperior accompliſhments, has placed certain perſons in the higheſt ranks in ſociety, to the excluſion of thoſe who poſſeſſed the requiſite talents, may be conſidered as a violation of

natural right. It is in a country where ſuch artificial diſtinctions of rank are eſtabliſhed, that people are to complain of inequality, and attempt a reform. But in a country where the laws know no diſtinction of rank, and furniſh equal ſecurity to the exertions of the various extent of human powers, we have no occaſion to trouble ourſelves with idle ſpeculations reſpecting equality. We ſhall find that the operation of theſe equal laws will be the eſtabliſhment of a gradation of ranks, and a variety of conditions, eſſential to the exiſtence of ſociety, and productive of the greateſt happineſs.

An attempt to reduce all men to a ſtate of equality would be a violation of the laws of nature, and ſuch a project could never be carried into effect. The man who poſſeſſing feeble powers of mind, but great ſtrength of body, acquires by conſtant labour the means of ſubſiſtence, can find no fault that a man poſſeſſing great ſtrength of intellect, with feeble powers of body, ſhould acquire by his own exertions immenſe wealth; for ſuch is the law of our being, and ſuch will be the reſult of things, where ſociety grants equal ſecurity to the exertions of different capacities. But this is counterbalanced by the conſideration that human happineſs is not unequal in proportion to the inequality of condition. Let not thoſe then who are placed in what is deemed the unfortunate grade of poverty, repine at their fate, or attempt to ſubvert the order of things, for in the humbleſt rank to which men are aſſigned by providence, this conſideration ought to ſilence every murmur, that human felicity is not proportioned to dignity of rank, or abundance of wealth, but is diſtributed with an equal tho ſparing hand to every grade, and that there is as much genuine bliſs to be found in the lowly cottages of the poor, as in the palaces of princes, or on the thrones of kings.

Section Fourth.

OF CIVIL GOVERNMENT.

TO underſtand the nature of laws, we muſt know the principles and forms of government. Upon a ſubject ſo extenſive and important

important, it is difficult to condenſe our obſervations into proper limits. In an inveſtigation ſo ſublime and pleaſing, it is difficult to ſet proper bounds to our enquiries. In an elementary treatiſe upon juriſprudence, we muſt reduce our remarks to a narrow compaſs.

Mankind, when they enter into the ſocial ſtate, and form the original compact, adopt ſome form of government.

There are four ſimple, uncompounded forms of government, to which all others are reducible. The firſt is where the ſupreme ſovereign power is veſted in the people, who collectively aſſemble for the purpoſes of legiſlation and government: this is called a democracy. The ſecond is where the ſovereignty is lodged in the hands of a council or ſenate, conſiſting of the principal perſons of the ſtate, either in reſpect of nobility, capacity, or probity: this is called an ariſtocracy. The third form is where the whole power is veſted in the hands of one perſon, which is called a monarchy. The fourth is a government by repreſentation, or a repreſentative republic, where the ſovereignty is lodged in the hands of certain repreſentatives, elected by the people, and to whom they delegate certain conſtitutional powers to promote the public welfare.

Theſe four different forms may be combined and modelled into a thouſand different governments.

Perhaps a pure and unmixed democracy has never exiſted in any age or country. Thoſe which have the neareſt reſemblance to it, will be found to have ſome tincture of ariſtocracy. The Areopagus of Athens, and the Senate of Rome, were a conſtant and powerful check upon the democracy. It may generally be remarked, that the more a government reſembles a pure democracy, the more they abound with diſorder and confuſion. That the people will frequently commit the moſt aſtoniſhing acts of cruelty and oppreſſion, that they have all the reliſh for war, and ambition for conqueſt, that diſtinguiſh monarchs, and that the conſequence of their violence and contention, is the eſtabliſhment of a deſpotic government. Theſe facts are moſt fully verified by the ſtories of the Grecian and Roman republics.

Many pure ariſtocracies have exiſted, ſuch as Venice, the United

Netherlands, and many of the Swiſs Cantons. Where certain well-calculated checks have been inſtituted, the community have ſometimes enjoyed a tolerable ſhare of political happineſs, but in general the happineſs of the many has been ſacrificed to the happineſs of the few.

Monarchies may be abſolute, or limited. Abſolute monarchies, where the will of the prince is the ſupreme law, and the lives and eſtates of his ſubjects are at his diſpoſal, have exiſted in ſome of the oriental countries: but the monarchies of Europe are limited by certain forms of proceeding, and certain long eſtabliſhed cuſtoms, which controul the will of the monarch, and temper the ſeverity of the government.

Of mixed governments, Sparta and Great-Britain conſtitute the moſt illuſtrious examples. Sparta may be conſidered as a compound of monarchy, ariſtocracy and democracy. There were two kings, a ſenate, and an aſſembly of the people. In Great-Britain there is a king, who has an hereditary right to the crown; a houſe of lords, who are hereditary nobles; but the houſe of commons being the repreſentatives of the people, cannot be conſidered as reſembling a democracy, but a repreſentative republic. This circumſtance conſtitutes the ſuperior excellence of this government. They have combined the advantages of monarchy and ariſtocracy, and for the rafhneſs and inſtability of democracy, they have ſubſtituted the advantages of a branch of the government by repreſentation.

A repreſentative republic may be conſtituted in different manners. The ſovereign authority may be collected in one center, or a ſingle houſe of repreſentatives, according to the French theories of government, or it may be veſted in a legiſlature conſiſting of three diſtinct branches, like the conſtitution of the United States, and ſeveral of the ſtate governments. The United States have exhibited the firſt fair example of a repreſentative republic, with a legiſlature, compoſed of three branches. It appears the beſt in theory of any government, that has been inſtituted, but time alone can determine how well it is calculated for energy and duration. The government of the United States is ſingular in this reſpect, that there are ſtate legiſlatures to regulate the interior local concerns of the

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ſeveral ſtates, while the federal legiſlature regulates the general concerns of the republic. The blending of theſe different governments, for different purpoſes, ſeems to be well calculated for an extenſive country, and if the line of demarcation between them, can be ſo accurately aſcertained, as to prevent any clafhing of juriſdiction, it will promote the happineſs of the people, and ſtrengthen the hands of the government.

Nothing can be more erroneous than the opinion that the government of the United States is a democracy. It has not a ſingle feature of that form of government. The people have no power but that of electing the repreſentatives, which they have not in a democracy; they can not do a ſingle act in framing the laws or adminiſtering the government, any more than they can in the moſt deſpotic government on the globe. Some have called it a repreſentative democracy; but this is a contradiction in terms, and as improper as to call it a democratic ariſtocracy; for democracy ſignifies a government by the people themſelves, and a repreſentative government is where the government is not by the people, but by repreſentatives for that purpoſe elected by the people, and to whom they have delegated the power of adminiſtering the government. Let us only conſider our government in this light, and many groundleſs prejudices will be removed. The people are inveſted with the right of electing their rulers, which is no part of government; and the adminiſtration of the government is in the hands of repreſentatives of different deſcriptions elected by the people. Here are neither democracy, ariſtocracy or monarchy. It is a pure original form of government.

An hiſtorical view of the progreſſive, but gradual improvement of government, from the earlieſt to the preſent time, would be a ſubject of the nobleſt ſpeculation—But our plan confines us to the utmoſt brevity.

The ancients were far behind the moderns in their improvement in the profound ſciences of government and policy. They had no idea of ſecuring the rights of the different orders in ſociety, and moderating the raſhneſs and impetuoſity of a democracy, by a

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fair and equal repreſentation of the people. [a] Tho they adopted a variety of expedients to check the power of the different orders, yet they never diſcovered the true principles of balancing them by an equal diſtribution of the legiſlative power among three branches, and ſeparating it from the executive and judiciary.

[b] In the heroic ages of Greece, when the people were in a paſtoral ſtate, they adopted forms of government of a democratic nature; inveſting the military command in a chief, in times of war. As they progreſſed in civilization, and agriculture, their chiefs gradually extended their power, till the people reſumed their rights and eſtabliſhed in the little territory of Greece, a number of republics, of an ariſtocratic, and democratic nature. In all, an imperfect effort was made, to balance the contending intereſt of the nobles and the people, and the inſtitutions of Lycurgus, and Solon, have immortalized their names as legiſlators in the page of hiſtory. Had that people, who have exhibited ſome of the boldeſt efforts of genius, and the ſublimeſt flights of imagination, hit upon the plan of a repreſentation of the people, and a diviſion of the legiſlature into three branches, they had not been a prey to anarchy and inteſtine wars, while their governments continued; nor had their country now been ſubjected to the deepeſt wretchedneſs and miſery, under the iron hand of Turkiſh deſpotiſm.

The Greeks had no juſt idea of preſerving the independence of the ſeveral ſtates and kingdoms of the world, by maintaining the balance of power between the whole. The Amphyctionic council was but a ſlimſy expedient to preſerve their liberties againſt inteſtine commotion and foreign invaſion. They ſoon acknowledged the ſuperiority of the Macedonian power, and ſuffered Alexander the great, to conquer a principal part of the civilized world, without any attempt to form a combination to check an enterpriſe ſo dangerous to all the nations of the earth. His premature death prevented him from ſecuring by the regulations of peace, the advantages he had acquired by the victory of his arms, [c] and af-

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[a] Adam's defence of the American conſtitution, Vol. I. I am bound to acknowledge that I am indebted to this work for many ideas and obſervations. The eminent author has not only exhibited a thorough and accurate knowledge of his ſubject; but he has detailed a beautiful theory, illuſtrated by the experience of paſt ages, that may be conſidered as a perfect ſtandard in the ſcience of government.

[b] Gillies hiſtory of Greece, Vol. I. [c] Roll. Anc. Hiſt.

ter a long ſeries of bloody wars, his conqueſts were divided by three of his captains into the deſpotic kingdoms of Syria, Egypt, and Macedon. All kingdoms eſtabliſhed by a leader at the head of his army, will partake of that military deſpotiſm which is neceſſary for the diſcipline of ſoldiers.

a During this time, the republic of Rome was extending its conqueſts over the neighbouring nations, in a manner of which hiſtory furniſhes no other example. In the firſt dawn of the Roman hiſtory, we find the people under the obedience of kings, whoſe abuſe of power, ſoon provoked them to reclaim their natural rights, and eſtabliſh a republican form of government. Tho the want of a balance of power, between the ſenate and the people, opened the door for perpetual diſcord and contention, yet their military ſpirit, and their ambition of empire, led them to atchieve the conqueſt of all the civilized nations of the earth, and the potent kingdoms founded by the ſucceſſors of Alexander, dwindled into provinces of the Roman empire. But the feeble and jarring powers of the government, were inſufficient to guard, protect, and defend a ſtate of ſuch vaſt extent. Had the powers of the ſenate and people been equipoiſed, and all the provinces fairly and equally repreſented, perhaps the Roman eagle would at this time have ſpread its wings over all the habitable countries on the globe. It is no wonder, that the exalted virtue and ſublime eloquence of Cicero could not ſtem the torrent of univerſal corruption, and reſtrain the licentiouſneſs of a populace, who in the wealthieſt city in the world, had in a collective body the ſupreme command of an empire. Rome was ripe for a revolution, when Julius Ceſar, the greateſt hero of antiquity, who by a ten years ſeries of victories, had conquered the fierce nations of Gaul, deſcended from the Alps, paſſed the Rubicon, and on the plains of Pharſalia, triumphed over the arms of Pompey, and trampled on the liberties of his country. But a Roman was found, who by the boldeſt exertion of patriotiſm dared aſſert the cauſe of liberty, and puniſh the uſurpation of the tyrant. In the capitol, in an aſſembly of the ſenate, the dagger of Brutus avenged the inſult done to his country; but the death of Ceſar neither expiated his crime, or reſtored the liberty of Rome. It opened anew the ſources of diſcord, and after oceans of Roman blood

a Ferguſon's hiſtory of Rome.

blood were ſhed, Auguſtus laid the permanent foundation of a deſpotiſm, that enabled his ſucceſſors to inſult the dignity of the world, and ſport with miſery of the human race.

In the fifth century, the eaſtern and weſtern diviſions of the Roman empire, held in ſervile ſubjection, the faireſt portion, and beſt cultivated part of Europe, Aſia, and Africa. The long, conſtant, and uniform operation of arbitrary power, and the blind ſubmiſſion to the will of a ſovereign, enervated the powers of genius, and checked the flights of imagination. The matchleſs eloquence of a Cicero, no more reſounded in the capitol, to defend the rights of man. The harmonious numbers of a Virgil and a Horace, no longer poliſhed the manners, and improved the virtues of the people. The laurel of fame, and the tribute of applauſe, were beſtowed on the vile ſycophants, who compoſed the moſt hyperbolical ſtrains of adulation. The feeble efforts of genius demonſtrated the ſhackles that were riveted on the human mind. The world was prepared for a revolution.

At this period, the uncivilized nations iſſued from the foreſts of Germany, ſubverted the Weſtern empire, and produced the moſt important revolution recorded in the annals of hiſtory. They changed the face of the earth, new manners and cuſtoms were introduced, new forms of government eſtabliſhed, and new codes of law promulgated. From this revolution, is derived the noble and romantic heroiſm of chivalry, which produced ſo great a difference of manners, between ancient and modern times; and the feudal ſyſtem which led the way to the diſcovery of repreſentation in government, and the balancing the different orders by three branches in the legiſlature. *f* A revolution of ſuch extenſive conſequence has long been a ſubject of ſpeculation to the literary world, and can never be too much contemplated or too fully inveſtigated.

All unpoliſhed nations, in that ſimple ſtate of ſociety which is denominated paſtoral, are led by the dictates of nature, to adopt ſimilar governments. Survey mankind through every period of hiſtory, and extend the eye to every nation on the globe, the Grecians, the Romans, the Germans, and the Tartars, and this truth will be fully demonſtrated.

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e Gibbon's hiſtory Roman Empire. *f* Robertſon's hiſt. Charles, V. vol. 1. Hume's hiſt. Eng. vol. vi. Gordon's hiſt. Rom. Emp. Millar on ranks in Society. Millar's Hiſt. view Eng. Gov. Sullivan's Lectures.

The manners of the Germans, ſeveral centuries before their invaſion of the Roman empire, were deſcribed by the maſterly pen of [g] Tacitus, who deſerves the title of the philoſophical hiſtorian.—The leading feature of their government, was democracy. In an aſſembly of the freemen, the ſupreme power was lodged. They elected a chief to preſide in their national councils, and conduct their military enterprizes. This aſſembly of the freemen was continued after they had made permanent ſettlements in the conquered countries, and eſtabliſhed on the ruins of deſpotiſm, the outlines of free conſtitutions. But I muſt confine my enquiries to that kingdom, which alone from the confuſion of the feudal ſyſtem, extracted a form of government, that has been the admiration of mankind.

In the middle of the fifth century, the Romans incapable of ſupporting their tottering empire, againſt the violent ſhock of the invaders, left the inhabitants of the ſouthern part of the iſland of Great-Britain, enervated and corrupted by the arts of peace, and the ſhackles of ſlavery, a feeble and defenceleſs prey, to the fierce and warlike inhabitants of Caledonia. Upon the invitation of Vortigern, the Britiſh king; the Saxons left the wilds of Germany, and came to their relief. The Picts, and Scots fled before their victorious arms: but the Britons experienced the ſame treatment from their allies, which they dreaded from their foes. After a bloody ſtruggle, ſeven Saxon chiefs erected their thrones. In the eighth century, the ſuperior valour and wiſdom of Egbert, united the country under the power of the Anglo-Saxons, from whom the Engliſh, and England derive their name. The Saxon conquerors introduced their own inſtitutions. The king was the chief, and the ſupreme power was veſted in the national council, called the Wittana gemote, conſiſting of all the freemen of the nation. In the diſtribution of the lands, the immediate retainers of the king held by feudal tenure, and the freemen by an allodial title.

[h] When England ſubmitted to another conqueror, and William the Norman, by the deciſive victory of Haſtings, gained an indiſputed title to the crown, he introduced into England the feudal tenures, with the rigorous and oppreſſive conſequences annexed to them on the continent, where all the allodial eſtates had been converted in-

g De moribus Germ. h Millar's hiſtorical View Eng. Gov.

to feuds. The allodial proprietors furrendered their lands, and became vaſſals of the king. The Witana gemote, aſſumed the name of parliament, and was compoſed of feudal barons. The jealous nobles, firmly reſiſted the efforts of the Norman kings to eſtabliſh an arbitrary ſway, and on the plains of Runny-Mead, extorted from John, the *Great Charter* which ſecured the independence of the parliament, and the liberties of the nation. In the progreſſive improvement of the ſtate, and from the more equal deſtribution of property, the perſons who had a right to a ſeat in the great council became numerous, and the poorer claſs were unwilling to bear the expenſe of attendance. The kings were deſirous that the lower order ſhould attend the parliament, for the purpoſe of counterbalancing the power of the great and wealthy barons.—Hence originated the election of knights of the ſhire and burgeſſes, to repreſent the counties and towns, by which their privileges were ſecured, and the expenſive attendance of the whole was ſaved.

The difference of rank between the nobles, and the repreſentatives, and the different rights to their ſeats, naturally led them to meet in different apartments, and form ſeparate deliberations and determinations. The king as the chief of the nation, naturally aſſumed the executive power: the judges by their uniform deciſions, eſtabliſhed a permanent ſyſtem of common law, which drew the buſineſs of that nature from the parliament, to their tribunals, and enabled them to aſſume a regular juriſdiction over all the controverſies of the people.

In this accidental manner originated, the principle of repreſentation, the balancing the orders of the people, by three branches in the legiſlature, and the ſeparation of the executive, legiſlative and judicative powers. The moſt capital improvements that ever had been made in government.

The improvements of the Engliſh nation, in the ſcience of government, were by our anceſtors at the time of their emigration tranſplanted to America. The greater part of that country which now compoſes the United States, was ſettled by private adventurers, without the aid of the crown of England. On their arrival in the wilderneſs, ſurrounded by ferocious tribes of ſavages, and expoſed

to

to the horrors of hunger and cold: they reverted to a ſtate of nature, and had the right of erecting ſuch form of government as they pleaſed. They were naturally led to copy as nearly as difference of ſituation and manners would admit, the inſtitutions of the country from whence they originated. A governor, council, and repreſentatives, bear ſome reſemblance to the king, lords, and commons of the Engliſh parliament. As they acknowledged allegiance to the Britiſh crown, no perſon could claim the pre-eminence of royalty. As none of the nobility had any inducement to exchange the luxuries of a cultivated country, for the enjoyment of religious liberty in a wilderneſs; there were none to claim the privileges of noble blood. Equal in point of rank, they were naturally led to fill every department with members elected from themſelves. By this accident, it was reſerved for America to give the laſt improvement to the form of government, by introducing the election of every branch from the body of the people. The governor, council, and repreſentatives, raiſed to office by the ſuffrages of their equals, were veſted with the ſupreme power of the ſtate: acknowledging the authority of the Britiſh crown, they preſented theſe free conſtitutions to the king, to be ſecured by the ſanction of a royal charter. Their reſemblance to the Engliſh conſtitution, and the contempt and indifference with which the little republics of America were beheld in England, induced the king to grant them charters, containing ſuch extenſive rights and privileges, as enabled them to reſiſt the tyranny of his ſucceſſors, and effect a revolution, which has fixed a new æra in the hiſtory of government, and policy.

The act of independence paſſed by Congreſs on the ever memorable 4th of July, 1776, diſſolved the political connexion between this country, and Great-Britain, and furniſhed the people with an opportunity of reaping the full advantages that naturally flow from the ſpirit and freedom of their governments. As ſoon as peace had healed the wounds of the country, bleeding from an eight years ſtruggle in the acquiſition of ſovereignty, and given the people an opportunity to reflect upon their ſituation, the fruits of their ſuperior knowledge in the ſcience of policy became conſpicuous. Convinced of the inſufficiency of the confederation, to render them a rich, a happy, and reſpectable nation, they exhibited to the world

an unparalleled example of public ſpirit, in adopting the preſent conſtitution of the United States. In this conſtitution the principles already diſcovered in America, are diſplayed in their full extent and meridian ſplendor. We here behold all the ingredients, that conſtitute a good government. The balance of power maintained by three branches of the legiſlature. A ſeparation of the legiſlative, executive and judicative powers, ſo as to operate as checks upon each other. A qualified negative on the legiſlature veſted in the executive, ſufficient to guard againſt any encroachment. Every branch of the legiſlature, and the ſupreme executive magiſtrate, ultimately elected by the people. The judiciary rendered independent. The repreſentatives ſufficiently numerous, and the empire properly diſtricted, ſo as to give them an opportunity to be well acquainted with the intereſt of every part of the community. Their elections ſufficiently frequent to give their conſtituents an effectual reſtraint upon them. The people are poſſeſſed of all the power, that can ſafely be lodged in their hands. The republics of Athens and Rome, have demonſtrated the danger of truſting the ſupreme power in large popular aſſemblies. The rights of electing the legiſlature and the ſupreme executive, may ſafely be veſted in them in their collective capacity, and this will be an eternal barrier to deſpotiſm.

In a country where the three ranks of a king, an hereditary nobility, and the people, were diſtinguiſhed, as in England, and the object was to ſecure them all in their different rights, the [1] Engliſh conſtitution was the beſt that human wiſdom could deviſe: in a country, like America, where there is no diſtinction of ranks, the preſent conſtitution is the beſt that could be adopted. The great ſuperiority of this conſtitution to the Britiſh, ariſes from the circumſtance that tho the ſupreme executive magiſtrate and ſenate are elective, yet their mode of election is ſo contrived, as to afford far more ſecurity and ſtability than reſult from the eaſigns and trappings of hereditary royalty and nobility.

An hereditary monarchy is certainly preferable to an elective, becauſe it prevents diſputes about the ſucceſſion. This conſtitution appoints

[1] I ſpeak of the general principles of the conſtitution. I do not mean to approve of the inequality of repreſentation, and the teſt and corporation acts. Thoſe diſgraceful reliques of an intolerant ſpirit.

appoints a ſucceſſor to the preſident, in caſe of a demiſe in office, ſo that there never can be an interregnum, nor a diſputed ſucceſſion. In the ſupreme executive and the ſenate, there is no danger that the right of birth will place in thoſe offices perſons who have nothing to boaſt of, but the merit and glory of their anceſtors.

In a country where the laws and the manners admit of but one order of citizens, and where the people inſtead of meeting in a body are governed by repreſentation, there may be a queſtion reſpecting the propriety and the neceſſity of a ſenate in the legiſlature. As the conſtitution is framed for a number of confederated ſtates, there is a peculiar propriety in a ſenate, for the purpoſe of maintaining the independence, and dignity of the ſeveral ſtates. But in all countries where there is no diſtinction of ranks, ſeveral reaſons will forever exiſt, that will juſtify the eſtabliſhment of a ſenate, for one branch of the legiſlature.

k In every age and nation, the natural inequality of mankind, ariſing from ſuperiority of ability and virtue, has laid the foundation of a natural ariſtocracy. In a legiſlature compoſed of a ſingle branch, the perſonal influence attendant on genius, merit, and learning, might enable the poſſeſſors to form combinations, and execute plans, dangerous to the liberties of the people. Remove them to a ſenate, (and ſuch will be the characters of which ſenates will always be compoſed) and they loſe the opportunity of inflaming popular aſſemblies, by the ſplendor of eloquence, and of perſuading them by the arts of intrigue, to adopt raſh and ruinous meaſures. This promotion will inhance their perſonal dignity, and leſſen their popular influence. A ſeat in the ſenate, is a proper reward for the ſervices of thoſe perſons who are by nature endowed with talents and diſpoſitions to do good to mankind. Such an object may divert the ardent purſuits of ambition, from ſchemes leſs praiſe worthy and honorable.—But there is another reaſon far more weighty and important.

In every legiſlature, there is a perpetual propenſity to enact too many laws, to attempt to regulate mankind, reſpecting matters that ought to be left to their own operation; different branches, will leſſen the facility of making laws, and check the rage of legiſlation

k Adams's defence of American Conſtitution.

lation ſo injurious to the community. A ſudden whim or popular clamor, may impel one branch to enact impolitic laws, which the other not being under the ſame influence, will reject. In two branches, where each have the power of originating, canvaſſing, and paſſing the acts, there will be much more deliberation, coolneſs, and caution, than in a ſingle body. Each branch, will watch with a narrow eye the conduct of the other, and will examine every bill with the utmoſt care, and criticiſe it with the utmoſt ſcrupolosity: they will in this manner diſcover defects, point out inconveniences, and ſuggeſt amendments, that would paſs unnoticed, in the haſty deliberation of a ſingle body. Tho the government be by repreſentation, which avoids many of the inconveniences of a democracy, yet if the repreſentatives ſhould be as numerous as public ſafety may require, it is poſſible that on ſome occaſions, they may be impreſſed by popular impulſe and clamor, and be led to all the exceſſes of democratic violence,—or if the repreſentation be ſo ſmall as to avoid that danger, then they may run into the oppoſite extreme of ariſtocracy. But where there is a ſenate, they will be able to controul the ſpirit of popular caprice, while the repreſentatives will counteract any ariſtocratic influence in the ſenate.

If all the members of a legiſlature are liable to frequent changes, they will never have that firmneſs, energy, and experience, which are neceſſary for the public ſecurity. If all the members of the legiſlature, are permitted to continue in office for any long period, there is a probability of their being under a temptation, to encroach upon the rights of the people. To guard againſt theſe inconveniences, there ought to be two branches in the legiſlature: let the houſe of repreſentatives be frequently elected, and the power of the people over them, will be ſufficient to reſtrain them from any acts of oppreſſion, and they will effectually check the ſenate. Let the ſenate be ſecure in their ſeats for a conſiderable time, and they will acquire ſufficient firmneſs and energy, to counteract the raſhneſs and imprudence of a houſe of repreſentatives, and defeat the clamor and violence of the people. Secure in their places, they will be able to ſteer the ſhip with a ſteady helm, through the moſt boiſterous ſtorms, and wait till the return of a calm, for the approbation of their conduct.

Many

Many have indulged their fancies in attempting to discover a reſemblance between the conſtitution of the United States, and the Britiſh conſtitution. They conſider the preſident to anſwer to the king, the ſenate to the lords, and the repreſentatives to the commons. The houſe of repreſentatives being elected by the people, reſembles the houſe of commons, but as the other branches are elective in this country, and hereditary in Great-Britain, the reſemblance is very remote, and the principles of the government widely different. Our Government is original in its conſtruction, and founded on a new baſis. We have ſteered clear of the inconveniences of monarchy, ariſtocracy, and democracy. We have eſtabliſhed a repreſentative republic. We have imitated the Britiſh nation only in the adoption of the excellent principle of balancing the legiſlature, by diſtributing it into three branches.

The principle upon which the government of the United States is founded, is the intereſt and the happineſs of the people. It is an appeal to their good ſenſe, and it muſt depend for its ſupport, upon a ſerious conviction of the neceſſity of ſubordination to government, for the ſecurity of their rights and privileges. It becomes therefore neceſſary to communicate to the people, juſt ideas reſpecting their own intereſt and welfare, and to impreſs and inculcate upon their minds, thoſe principles which are eſſential to the preſervation of civil liberty and good government.

A ſlight obſervation of human nature, will demonſtrate that the remarks which [l] Tacitus, and [m] Voltaire have made reſpecting the Romans, and the Engliſh, are applicable to all nations. *That they can neither bear total ſervitude, or total liberty.* Another obſervation is equally evident, that man is extremely unwilling to ſubmit to the exerciſe of authority over himſelf, but is very willing to exerciſe it over others. Kings are not the only perſons that are pleaſed with the exerciſe of ſovereign power. The people in ſome inſtances have manifeſted a keen reliſh for this buſineſs. The populace of Rome during the period of the republic, appeared to glow with all the ambition of conqueſt, and to be delighted in tyranniſing over all the nations of the world. They wiſhed to be free

[l] Nec totam ſervitutem, nec totam libertatem pati poſſunt.

[m] Et ſit aimer ſon joug a l'Anglois indompte,
Qui ne peut ſervir, ne vivre en liberte.
Henriade, Liv. I.

free themſelves, and reduce all nations to ſlavery. But while they exerciſed a ſevere authority over their neighbours, they kept Rome in perpetual tumult and confuſion, becauſe they would not ſubmit to the neceſſary reſtraints of law. The conſequence of this principle which is common to the human race, is that in the eſtabliſhment of governments, if ſo large a ſhare of liberty be allowed to the people, as ſeems to be neceſſary to conſtitute ſocial happineſs, there is great danger that they will abuſe their liberty and ſubvert the government: if ſufficient power be veſted in the government to reſtrain the violence of the people, then there is danger that the rulers will abuſe this power and proſtitute it to the oppreſſion of the people, and the deſtruction of liberty. To hit upon a form of government, which would ſafely ſteer between theſe extremes, and while it repreſſes the violence of the people, guard againſt the encroachments of the rulers, is the great deſideratum in civil policy. Such however is the difference of human character in different ages and countries, owing to the difference of climate and ſtate of ſociety, that it is not probable that any one conſtitution can be diſcovered, which will be adapted to every country, and productive of theſe important effects. In conſtituting a government, therefore, it is neceſſary to take into conſideration the ſtate of ſociety and manners, and eſtabliſh it on principles that are conformable to them. In this country, this principle appears to have been adhered to as far as circumſtances would admit. Our conſtitution is the beſt calculated to ſteer between the extremes of anarchy and deſpotiſm, of any that has been adopted.

It may be ſaid with truth, that by the conſtitution of the United States, the powers of the ſeveral branches of the government, are ſo reſtricted, and check each other in ſuch a manner, that they can never gain the ſtrength of deſpotiſm, or be exerted to the oppreſſion of the people. The equality of repreſentation, and the frequency of elections, give the people an effectual check, upon their rulers, and at the ſame time, place them in the moſt perfect ſtate of reſponſibility. Their liability to be diſmiſſed from office, for miſconduct, and their obligation to obey the laws which they make, will operate upon them as a perpetual motive to conſult the general good, and to acquire the favour and confidence of the people. In-

deed

deed, there is every poſſible motive exiſting that can be, to induce the legiſlature of the United States, to exert all their talents for the public welfare, while no rational motive can exiſt to induce them to oppreſs, or injure the people. While the legiſlature is pure and uncorrupted, it will be impoſſible for either of the other branches of the government, to become deſpotic. A government that is founded upon the intereſt of the people can derive no pleaſure from any conſideration but the promotion of their welfare, and happineſs. From this fair repreſentation of the conſtitution of the United States, it is evident that it merits an unlimited truſt, and that we may diſcard the dæmon of jealouſy, which is a bane to the energy of government, and a poiſon to the confidence of the people.

It muſt be a pleaſing conſideration that we have diſcovered and adopted a conſtitution, which there is no probability will ever degenerate into tyranny. It would be a ſubject that would furniſh the higheſt ſatisfaction, if we could trace in it thoſe ſeeds of energy, which might ſpring up, grow, and arrive to ſuch maturity, as to defend it from all the attacks of anarchy. If the general government has any thing to fear, it is to be apprehended from that quarter. While the wind is fair, and the ſky ſerene, there is no danger but that the ſhip will ſail with ſafety, but when ſtorms, and tempeſts riſe, is there not ſome danger that ſhe may be wrecked on the rocks of diſorder, or ſwallowed up in the whirlpool of popular violence? As we wiſh to guard againſt the approach of the remoteſt diſorder, let us contemplate the difficulties we have to encounter, and prepare the remedy.

The ſtate governments, like a chain of mountains, form a barrier againſt the the encroachment of the general government—but may they not be converted into engines of oppoſition, to the moſt neceſſary meaſures? The pride of the large ſtates, and their natural jealouſy reſpecting the general government, may lead to ſome meaſures inconſiſtent with the peace of the union, for the purpoſe of maintaining their own importance. Could all the ſtate governments be broken down, and then divided into ſtates of proper and convenient extent, ſo as to provide ſuch local regulations, as they can better provide than the legiſlature of the Uni-

ted States, and at the ſame time, not have ſo much power as to threaten or endanger the general tranquility, it would probably be found a great improvement in our conſtitution.

But at preſent, perhaps, the greateſt danger ariſes from the introduction of principles which are equally deſtructive of civil liberty and good government. While we are avoiding the extreme of abſolute monarchy, which has been ſo oppreſſive to the people, there is a poſſibility of our running into the oppoſite extreme, and renouncing thoſe principles which are the baſis of a free government. So much has been ſaid reſpecting the majeſty of the people, the fountain of power, from whom government originates, and for whoſe benefit laws are enacted, that many begin to entertain an idea that it is incompatible with their ſovereignty, that they ſhould be governed. Hence it is a common phraſe, that the people are the maſters, and the legiſlature their ſervants. The conſequence is, that the ſupreme power yet remains in the people, that they may make, and unmake governments as they pleaſe, and that revolutions are forever at their command: That the legiſlature are bound to obey their inſtructions, and watch and purſue their will. Admitting theſe principles to be true, it follows neceſſarily that the people are not bound to regard the laws unleſs they meet with their approbation. For nothing can be more abſurd, than to require of the maſters, obedience to the mandates of their ſervants, unleſs they think it proper. Every law therefore muſt be taken into conſideration by the ſovereign people, and when they have given them their ſanction, they will obey them. The ſlighteſt attention muſt convince every body of the impracticability of executing a government upon this plan. It is a principle of diſorganization, it ſubverts order and introduces anarchy. To avoid this extreme, let us conſider the true principles of our government.

Our government originated from the people, and was inſtituted for their ſole benefit. The impracticability of aſſembling a great nation to collect their will, rendered it neceſſary that certain perſons ſhould be elected, to whom the power of acting for the people ſhould be delegated. This conſtitutes our government, to be a repreſentative

ſentative republic, and an attention to this leading feature will unfold the baſis on which it is eſtabliſhed, and the principles by which it is to be executed. A government by repreſentation, implies the idea that the repreſentatives ſtand in the place of the people, and are veſted with all their power, within the conſtitution. In the legiſlature, therefore, conſiſting of the repreſentatives, is concentered the majeſty of the people, and the ſupremacy of the government. They are neither bound to obey the inſtructions, nor to conſult the will of the people—but being in their place, and veſted with all their power, they have a right to adopt and purſue ſuch meaſures as in their judgment, are beſt calculated to promote the happineſs and welfare of the community, in the ſame manner as the people themſelves would act, if it were poſſible for them to aſſemble and deliberate on their common concerns. The reaſon why the inſtructions of the people are not to be regarded is, becauſe it is impoſſible that the general ſenſe ſhould be collected: and even if that could be done, they have not thoſe means of information which are neceſſary to qualify them to deliberate and decide. As to the inſtructions from any particular diſtrict, to the repreſentative by them elected, they ought to have no influence, becauſe when elected, a perſon becomes the repreſentative of the community at large; he cannot therefore regard the inſtructions of his immediate conſtituents, but muſt conſult the general good of the community and not the particular advantage of a diſtrict.

The only mode by which a legiſlature can act, is by a conſtitutional promulgation of laws. No individual has the power to command or compel the people to do any act, for his perſonal advantage; they can only be governed by general laws, virtually enacted by themſelves, for their benefit, and which the individual members of the legiſlature, are as much bound to obey, as the people at large. The legiſlature therefore, can neither be conſidered as the maſters or the ſervants of the people; they are their repreſentatives, poſſeſſing all their power for certain purpoſes: all their laws are the will of the people, expreſſed in a conſtitutional manner by their repreſentatives, and on that ground are entitled to an implicit and unqualified obedience. It is to the laws,

only that the people are ſubject ; ſo that in the ſtricteſt ſenſe of the word, this may be ſaid to be a government of laws and not of men.

The pride of a nation or individual, may revolt at the idea of yielding ſubmiſſion to the mandates of a monarch : but it cannot be conſidered as degrading to ſubmit to the national will, expreſſed by its repreſentatives. A man muſt derive a dignity and importance from the conſideration, that he is virtually his own legiſlator : and inſtead of wiſhing to elevate himſelf above the laws, thus enacted, he will be the more ſtrongly induced to yield them obedience.— When the will of the people has been thus virtually expreſſed by themſelves, and actually by the repreſentatives, it cannot be again ſubmitted to them, to decide, whether they are bound to obey. Implicit obedience is an abſolute duty. If they deem the laws improper, unconſtitutional, or oppreſſive, they have the right to elect different repreſentatives, who will repeal them. It is this power of the people over their repreſentatives, that conſtitutes the ſecurity of their rights, and not the power of reſiſting the laws. If the people at large are veſted with the rights of reconſidering and deciding upon the acts of the legiſlature, all the advantages of repreſentation are loſt. The general will of the community could never be collected, different diſtricts would form contradictory decrees, and inſtead of law and order, there would be perpetual controverſies and confuſion.

There muſt ſomewhere reſide a ſupreme power in the government : it cannot be placed in the body of the people, it muſt be in the legiſlature, which is conſtituted for that purpoſe, where the government is republican : but where it is deſpotic, it is in the hands of the monarch. In the firſt inſtance, the laws are grounded on the general good ; in the laſt, the will of the monarch only is to be conſulted : but the laws in the firſt caſe ought to be deemed as abſolute, as they are pretended to be in the laſt. Where the laws govern, let them be abſolute, ſupreme, and ſovereign.

SECTION FIFTH.

OF CIVIL LAW.

IT has already been remarked, that when man enters into a ſtate of ſociety, he reſigns a part of his natural rights to obtain civil rights. Their ſecurity is the object of law, and bounds the power of legiſlation. Their enjoyment furniſhes mankind with the greateſt political happineſs.

Civil law may then be defined, to be a rule of human action, adopted by mankind in a ſtate of ſociety, or preſcribed by the ſupreme power of the government, requiring a courſe of conduct not repugnant to morality or religion, productive of the greateſt political happineſs, and prohibiting actions contrary thereto, and which is enforced by the ſanction of pains and penalties. A few remarks will illuſtrate this definition.

Civil law is conſidered to be a more proper expreſſion, than municipal law, a term made uſe of by the Engliſh lawyers, where the term civil law is uſually by way of eminence, applied to the Roman or Imperial law—but as we have little connexion with the Roman law, and the term civil being commonly applied to our laws, I have reſtored it to its proper place, and have rejected the word municipal, which is too limited in its ſignification, to convey a juſt idea of this definition. It is a rule of action that is ſteady, permanent and univerſal, obligatory on the whole community, and adopted by mankind in a ſtate of ſociety, or preſcribed by the ſupreme power of the government. It concerns them only in the ſocial ſtate, and points out the duties they owe to their neighbours, and to the commmunity that protects them. [a] The outlines are to live honeſtly, hurt nobody, and to render to every one his due. It derives its authority, not only from being adopted by the univerſal and immemorial conſent of the people as the common law, but from the poſitive acts made by the ſupreme legiſlature, which is the ſtatute law. It requires a courſe of conduct, not repugnant to morality and religion, but productive of the greateſt political happineſs, and prohibits actions contrary thereto. The uſual definition is, commanding what is right, and prohibiting

[a] Juris præcepta ſunt hæc, honeſte vivere, alterum non ledere ſuum cuique tribuere. Juſtinian's Inſt. L. i, iii.

prohibiting what is wrong. But that is too indefinite and general, and more applicable to the moral than civil law. It is true that it is generally remarked by writers, that law is grounded on moral principles, but a few obſervations will evidence this to be an error. The ſole purpoſe for which men unite in ſociety, is the ſecurity of that portion of the natural rights which they reſerve, and the civil rights which they acquire. The legiſlature, therefore, have no right to controul any actions, but thoſe which are injurious to their rights, and endanger the exiſtence of the ſtate. It is evident that no government has adoped the moral law as a rule, becauſe, in all, many actions are required to be done, which are morally indifferent, and many actions are not prohibited which are morally wrong. When it is acknowledged the government may omit the prohibition of immoral actions, and require the performance of indifferent, it follows as a conſequence that they are guided by ſome rule different from morality. This rule is the political happineſs of the people. It however muſt be conſidered, that no laws may contravene the principles of morality. When the legiſlature enact and publiſh laws, it is not for the people to examine them, and determine whether they will comply with them. They are virtually preſent by their repreſentatives and aſſent to them when they are made. The laws therefore operate with the force of commands, and obedience becomes the duty of the citizens.

But the laws would be of but little validity, if they were not enforced by the ſanction of pains and penalties. Human legiſlators beſtow no rewards on the act of obedience, but the bleſſings which neceſſarily flow from it. They annex certain pains and penalties to every violation of their laws, which operate as motives on the mind, to enforce an obſervance of them. The meaſure of puniſhment is to ſubject the offender to an inconvenience greater than the advantage he can derive from the crime.

[e] Cicero has defined law to be a juſt command, directing what is right, and prohibiting the contrary. [f] Juſtinian has defined law, to be that which each nation has eſtabliſhed for itſelf, and is proper to each ſtate or civil ſociety. [g] Blackſtone has defined it to

[e] Sanctio juſſa jubens honeſta et prohibens contraria.

[f] Quod quisque populus ipse ſibi jus conſtituit id ipſius proprium civitatis eſt vocatur que jus civile. Juſt. Inſt. lib. i. tit. 2.

[g] 1 Black. Com. 44.

to be a rule of action, prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong. The definition of Justinian is too confined, and does not give an idea of the nature and extent of law. The definitions of Cicero and Blackstone seem to be grounded on the principles of the natural law, and do not reach the full extent of the civil law: and the definition of Blackstone is confined to statute law only, because it will comprehend those laws only which are prescribed by the supreme power of the state. In my definition, I have aimed to give a just idea of law in its fullest extent. It comprehends the statute, and the common law, and instead of limiting it to the commanding of what is right, and prohibiting what is wrong, I have extended it to the commanding or prohibiting of those actions which are morally indifferent, if it be necessary to promote the political happiness of mankind. This I consider to be the just bound of civil law.

The science of the law is grounded on certain first principles. These have been introduced by the statutes of the legislature, or have been derived from the dictates of reason, and the science of morals. On this basis, our courts have erected an artificial fabrick of jurisprudence, they have adjusted the various parts with the nicest symetry; and a deviation from any fundamental principle, deranges the whole superstructure. A judge therefore in forming his opinion, with respect to any particular case, must take into view the whole system of law, and make his decision conformable to the general principles on which it is founded. Nothing can be more improper than the practice of considering every case as standing on its own basis, and of deciding according to principles of right, which appear to be applicable to single cases. This will make the law uncertain, introduce contradictory determinations, and render it impracticable to systematize the principles of jurisprudence. But when courts take into view, the whole science, and square their decisions to the fundamental doctrines on which it is established, the consequence will be the introduction of that permanent uniform rule of administering justice, which is the ultimate object of government.

SECTION SIXTH.

OF THE LAWS OF CONNECTICUT.

WE come now to treat of the code of civil law, adopted in this ſtate, which conſiſts of two parts, the common law and the ſtatute law, which require a ſeparate conſideration.

I. The Common Law derives its force and authority, from the univerſal conſent and immemorial practice of the people. It has never received the ſanction of the legiſlature, by any expreſs act, which is the criterion by which it is diſtinguiſhed from the ſtatute law. It has never been reduced to writing, but depends on the general practice and judicial adjudications of courts. The common law is derived from two ſources, the common law of England, and the practice and deciſions of our own courts.

1. I ſhall firſt conſider that branch of the common law that originated in England. As our anceſtors adopted the form of, and acknowledged allegiance to the Britiſh government, it was natural for them to admit and eſtabliſh their laws, ſo far as it was conſiſtent with the difference of ſituation. From this circumſtance, our common law became chiefly of Engliſh original, and we muſt trace their juriſprudence, to aſcertain the foundation and extent of our own. The revolutions that England underwent by the conqueſts of the Romans, the Saxons, the Danes, and the Normans, rendered their law of complex origin. After the Norman conqueſt, as ſoon as the government had aſſumed a regular form, the acts of parliament and the deciſions of their courts, laid the foundation of their preſent code. They adopted a principle which is common to all nations, that when a court had ſolemnly and deliberately decided any queſtion or point of law, that adjudication became a precedent in all caſes of a ſimilar nature, and operated with the force and authority of a law. This practice is founded in the higheſt wiſdom, and produces the beſt effects.

It eſtabliſhes one permanent uniform, univerſal directory, for the conduct of the whole community, and opens the door for a conſtant progreſſive improvement in the laws, in proportion to the civiliza-

tion

tion of their manners, and the encreaſe of their wealth, while the legiſlature were paſſing acts for general regulations, the courts were poliſhing, improving, and perfecting a ſyſtem of conduct, for the minuter ſubordinate tranſactions of life, which by the collective wiſdom and experience of ſucceſſive ages, have advanced to the higheſt pitch of clearneſs, certainty, and preciſion.

Courts however are not abſolutely bound by the authority of precedents. If a determination has been founded upon miſtaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of the law, a ſubſequent court aſſumes the power to vary from or contradict it. In ſuch caſes they do not determine the prior deciſions to be bad law ; but that they are not law. Thus in the very nature of the inſtitution, is a principle eſtabliſhed which corrects all errors and rectifies all miſtakes.

The common law of England is a highly improved ſyſtem of reaſon, founded on the nature and fitneſs of things, and furniſhes the beſt ſtandard of civil conduct. It is to be found in the adjudications of courts, which have been collected and publiſhed by judges, lawyers, and other officers. Theſe adjudications are contained in year books which are extant, from the reign of Edward the ſecond, till the reign of Henry the eighth, and then in reports which have been continued to the preſent time. Beſides theſe reports, the common law has been improved by treatiſes of a ſyſtematic nature, which are held in high veneration and reſpect.—Such are the works of Glanville, Bracton, Britton, Fitzherbert, Littleton, and Lord Coke—But no writer on law has acquired greater diſtinction than Sir William Blackſtone. He has reduced order out of chaos, and in his commentaries, exhibited a compleat ſyſtem of the laws of England. From this work the ſtudent will obtain a general underſtanding of this ſcience, in a much ſhorter time than from any other author. His writings entitle him to the thanks of every country where Engliſh juriſprudence is practiſed, and have ſecured to him a fame that will laſt as long as the memory of thoſe laws on which he has written ſhall endure.

But I ought not to omit the names of Reeve, Powel, and 'Eſpinaſſe, the moſt diſtinguiſhed judicial writers of the preſent age.

Reeve has exhibited a view of the origin, progreſs and gradual improvement of the Engliſh law, with all the elegance of an hiſtorical writer, and all the preciſion of a lawyer. Powel has facilitated the acquiſition of legal ſcience, by arranging and ſyſtematizing in the cleareſt manner, all the learning ſcattered over a thouſands volumes, reſpecting contracts, mortgages, deviſes, and powers; and 'Eſpinaſſe has anſwered the ſame purpoſe with reſpect to practice, by his digeſt of the law of actions. Theſe writers are inferior to none of their predeceſſors in point of genius and knowledge, and have an equal proſpect of immortal fame.

From this code we derive the greateſt part of our common law. Our anceſtors having ſettled this country without the aid of the Britiſh crown, were under no obligation to obey the government, or obſerve the laws of the country, from whence they emigrated. They might have inſtituted their own government, and promulgated their own laws. But prudence and policy dictated the meaſure, for the purpoſe of acquiring the protection of a powerful kingdom. This voluntary reception of the Engliſh laws, by the general conſent of the people, is the only foundation of their authority. At the late revolution, when we were ſeparated from the Britiſh empire, the general conſent and approbation of the people, eſtabliſhed the common law of England, as far as it is warrented by reaſon, and conformable to our circumſtances, to be the law of the land. It has alſo been the practice of our courts to regard the deciſions of the courts of Weſtminſter Hall, ſince the revolution, where they relate to ſimilar queſtions. But theſe have no intrinſic authority. They reſt on their reaſonableneſs and propriety. But this method deſerves high commendation, becauſe it furniſhes our courts with the opportunity of incorporating with our law, all the improvements that are made in England.

There is no general rule to aſcertain what part of the Engliſh common law is valid and binding. [r] To run the line of diſtinction, is a ſubject of embarraſſment to courts, and the want of it great perplexity to the ſtudent. It may however be obſerved generally, that it is binding where it has not been ſuperſeded by ſtatute, or varied by cuſtom, and where it is founded in reaſon, and conſonant to

[r] Kirby's Rep. Preface.

to the genius and manners of the people. But the only certain rule by which the writer or the ſtudent can be directed, muſt be the practice and deciſions of our own courts. As theſe have not been committed to writing, they can be learned only by attendance on the courts, where they are promulgated, which evidences the neceſſity of a treatiſe to point out how far, and in what manner our courts have adopted the common law of England. If reports had been taken of all the adjudications of our courts, the greater part of the common law might have been conſidered as adopted, and we ſhould have had occaſion to have recurred only to our own reports, for authorities. But as reports have not been taken, we are now obliged to ſearch the Engliſh authorities for precedents and principles, which have been ſettled by our courts. This continues the difficulty of determining how far the Engliſh common law is binding. It is neceſſary in this place only to remark that ſuch parts of it as have been admitted, relate to general maxims, and firſt principles, definitions of technical terms, the ſeveral kinds of things or eſtate, the formalities of contracts, and transfers of property, the nature of actions, the forms of declarations, the mode of pleading, and the mode of trial.

It was manifeſtly the object of the legiſlature of this country, at the commencement of the government, to introduce a general code of juriſprudence by ſtatute. Hence we find many ſtatutes in very early periods, producing a material variation from the Engliſh laws, and to this circumſtance it is very probably owing that the laws in this ſtate, are ſo much more different from the laws of the country from whence we emigrated, than they are in any other ſtate in the union. In conſequence of the adoption of this principle, we find that our anceſtors, inſtead of conſidering the common law of England to be the baſis of their juriſprudence, and in all caſes binding, have only conſidered it as auxiliary to our ſtatutes. In caſe of any defects in the ſtatutes, recourſe was had to the ſyſtem of common law, to explain technical terms, to eſtabliſh forms of proceeding, and to adopt ſuch general principles, as could not be introduced by ſtatute in the infancy of a country. The validity of it therefore in all caſes depended upon its being approved of, and adopted by the courts, and the authority of the courts to admit it, originated

in the general conſent of the people, as no ſtatute was ever made on that ſubject. In ſuch caſes our courts exerciſed the ſame diſcretionary power and juriſdiction, as have been exerciſed by all the Engliſh judges, from the earlieſt periods of their government, to the preſent time. There are a vaſt many improvements which were introduced by the courts without any legiſlative act. The beſt part of the fame of the celebrated Lord Mansfield, is owing to his meritorious exertions, to extend the ſpeedy remedy of the law as far as poſſible, to prevent the circuitous, expenſive and lengthy applications in chancery. Our courts have always acted upon the ſame general principles, as the Britiſh courts. Conformably to this practice is the opinion of the ſuperior court, in the caſe of *ſ* Wilford, &c. againſt Grant, which was approved by the ſupreme court of errors. "The common law of England we are to pay great deference "to, as being a general ſyſtem of improved reaſon, and a ſource, "from whence our principles of juriſprudence have been moſtly "drawn. The rules, however, which have not been made our "own by adoption, we are to examine, and ſo far vary from them "as they may appear contrary to reaſon, or unadapted to our "local circumſtances, the policy of our law, or ſimplicity of our "practice." Under theſe reſtrictions and limitations, the common law of England may now be conſidered obligatory in this ſtate. Whenever a queſtion ariſes which has not been ſettled by ſtatute, or by ſome principle of the common law, adopted by our courts, we are then to examine and compare the rules of the common law of England relative to the point, and if they are found reaſonable and applicable, the court will adopt them, and if not, then they will decide the queſtion on ſuch principles, as reſult from the general policy of our code of juriſprudence, and which are conformable to reaſon and juſtice. That part of the Engliſh common law, which has been thus approved by the courts, may be conſidered as our common law by adoption; that part which has not been thus adopted, may in virtue of the general aſſent of the people, and the practice of our courts, be conſidered obligatory, ſo far as it is conſiſtent with reaſon, adapted to our local circumſtances, and conformable to the policy of our juriſprudence.

The Engliſh common law has never been conſidered to be more obligatory

ſ Kirby's Rep. 114.

obligatory here, than the Roman law has been in England. There in all caſes where the reaſon of the Roman law was applicable, the courts have adopted it; and they have derived many important and uſeful rules and principles from it.

2. The practice and deciſions of our own courts, have given birth to another branch of common law. We have introduced the Engliſh practice with reſpect to the authority of precedents. Courts are not at liberty to depart from prior deciſions, in ſimilar caſes, unleſs they are repugnant to reaſon. It is therefore a common practice, when any diſpute ariſes reſpecting a point of law, to refer to precedents. The uncertainty, and contradiction of oral reports of caſes, induced the legiſlature to paſs an act, requiring the judges of the ſupreme court of errors, and the ſuperior court, in all diſputes upon queſtions of law, to reduce the grounds and reaſons of their opinions to writing, and lodge them with the clerk of the ſuperior court, for the purpoſe of forming a perfect and permanent ſyſtem of common law. This is a moſt excellent expedient to aſcertain the points ſettled by the court, but reports of the caſes are neceſſary to compleat the plan. To accompliſh this purpoſe, Mr. Kirby has publiſhed a valuable volume of reports of caſes, adjudged in the ſuperior court, from the year 1785, to 1788. This volume of reports is all that we have written upon our common law: we are therefore obliged to truſt to the memory of man, for thoſe adjudications, on which our rights depend. This will continue that uncertainty, and contradiction that has been the ſubject of ſo much complaint, till a reform takes place. Reports would be of the higheſt advantage, to improve and perfect our laws, to fix and perpetuate a permanent univerſal rule, that ſhould render the deciſions of different courts uniform and conſiſtent.

The only courts whoſe deciſions have the authority of precedents, are the ſupreme court of errors, and the ſuperior court. The judgments of the latter may be reviſed on a writ of error brought to the ſupreme court of errors, where determinations are concluſive, and who are the dernier reſort in ſettling the principles of law. But ſo long as the judgments of the ſuperior court are unreverſed, they are deemed to be law.

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The conſequence of admitting the doctrine that a judicial deciſion becomes a rule in all ſimilar caſes, has been very important. Our courts by legal adjudications, have given new force, and evidence to a principal part of the common law of England, and have eſtabliſhed it to be the common law of this ſtate. They have by a ſeries of deciſions aſcertained the conſtruction of the ſtatutes, by which many very important points, and principles have been ſettled.

The conſequence of the doctrine that the Engliſh common law is not in itſelf binding in this ſtate, has been the introduction of many new rules, and principles, which have greatly improved our legal ſyſtem. Our anceſtors unfettered by the ſhackles of forms, cuſtoms, and precedents, have attended to enlarged, and liberal views of policy; and from the operation of our ſtatutes, which ſo materially changed the common law, at the ſame time regarding the ſingular, and fortunate ſituation of our country, at its firſt ſettlement, with our difference in manners and character, from the nation from whence we migrated, have deduced a variety of legal principles, and have adapted them, to the ſtate of this country, which conſtitute the main excellence of our juriſprudence.

When it was received as a general maxim, that the common law was binding only, when reaſonable, and applicable, the neceſſary conſequence was, that in all caſes of a defect of common law, not ſupplied by ſtatute, the courts muſt ſupply it by an adjudication, grounded upon the baſis of all laws, reaſon and juſtice. This permitted them to reject many of the principles of the common law, which having been introduced into England in a barbarous, and ignorant period, when the rights, and privileges of man were inaccurately underſtood, had become inconvenient, and burdenſome, but being interwoven in their code, could not be there rejected by their courts. It gave our courts at the ſame time, an opportunity to introduce all thoſe important principles, which better information had diſcovered. In all inſtances then, where there has been a legal deciſion of our courts, repugnant to any of the rules of the common law, it may be conſidered as repealed, and the adjudication of our courts, is common law in this ſtate. Our courts ſtill poſſeſs, and exerciſe the ſame privilege, and whenever they find

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the common law unreaſonable, impolitic, or unjuſt, or repugnant to the general tenor of our juriſprudence, they have rejected it, and adopted, ſuch rules in their deciſions, as they conceived to be right, and conſonant to the general principles of our law. † Such was the caſe of Wilford, vs. Grant. Judgment had been rendered againſt adults, on trial, and conviction, and againſt minors by default, without aſſigning them guardians. The queſtion on a writ of error was whether judgment, could be affirmed againſt the adults, and reverſed as to the minors. It was agreed that the rules of the common law, were againſt a reverſal in part in ſuch caſe ; but the court ſaid, that it had been admitted in other caſes without any apparent diverſity of reaſon, and as it did not appear to have been adopted in practice, ſo as to become aurthoritative, they would not regard it, but in purſuance of the general principles of reaſon, and law, they would reverſe the judgment as to the minors only.

One part of the Engliſh common law conſiſts in particular local cuſtoms, which affect only the inhabitants of particular diſtricts. But in this ſtate we have no local cuſtoms, but the citizens are all governed by the ſame general rule : unleſs we except the five city corporations, whoſe peculiar rights, and privileges are deſignated in the ſtatutes by which they are incorporated.

II. The other branch of our laws conſiſts of ſtatutes which are enacted, by the general aſſembly, the ſupreme legiſlative power.

Statutes are either general or ſpecial, public or private. General, or public ſtatutes, have univerſal authority. They are printed and diſtributed thro the ſtate, and courts are bound officially to take notice of them, without being ſpecially pleaded by the party who wiſhes to take benefit of them. Special or private ſtatutes, relate to the concerns of particular perſons, they are not publiſhed with the public ſtatutes, and courts are not bound to regard them, unleſs they are ſpecially pleaded by the party, who wiſhes to take benefit of their operation, and in whoſe favor they are made. Statutes are ſaid to be declaratory of the common law, or remedial of ſome defects, operating by way of enlarging, or reſtraining.

Statutes affirm, alter, amend, or change the common law, as caſes require, or introduce regulations wholly new. In this country it has

† Kirb. Rep. 114.

has been the object of the legiſlature to promulgate an equal code of laws, correſpondent to the liberal principles, which are prevalent among mankind. They avoided adopting the ſlaviſh principles interwoven in the legal code of the native country of their anceſtors, in the times of ignorance and tyranny. Having no prejudice in favour of long-eſtabliſhed errors, and the venerable abſurdities of antiquity to combat, they had an uninterrupted career in eſtabliſhing political liberty, and happineſs. Such is the advantage of founding a government, and inſtituting laws in an enlightened period of the world.

In framing laws, it is the duty of the legiſlature to render them as clear, intelligible, and explicit as poſſible, ſo that there can be no doubt about the meaning and intent of them, but as this is extremely difficult, mankind being apt to differ about the meaning of them, certain rules have been adopted for their interpretation and conſtruction. The faireſt and moſt eaſy method of conſtruction, is to conſider and inveſtigate the intent of the legiſlature by the ſigns with which it is expreſſed.

1. "Words that are uſed in enacting laws, are to be taken and conſidered in their common, cuſtomary, and popular uſe, and no grammatical conſtruction will be admitted to vary or controul the apparent meaning of the law.

2. Terms of art, or technical terms muſt be conſidered according to the import and meaning of them in that art, ſcience, or trade from whence they are taken.

3. Where words are clearly repugnant to each other, in two laws, the laſt will ſuperſede the firſt. Later laws abrogate prior contrary laws, is a maxim adopted by all nations in their civil inſtitutions.

4. When words are dubious, equivocal, or intricate, it is proper to conſider the preamble of the act, which will often explain the intent of it, or compare them to ſome other law made by the ſame legiſlator and relating to the ſame point.

5. We muſt always take into conſideration, the ſubject matter about

" 1 Black. Com.

about which the law is concerned, and affix to the words made uſe of, a meaning correſponding to the ſubject to which they are applied. For the ſame words when applied to different ſubjects, have different meanings. That meaning muſt be taken which is commonly intended, when employed upon that ſubject about which the law is converſant.

6. Where words have no ſignification, or a very abſurd one, if taken according to their literal common acceptation, there it is neceſſary to deviate from the common ſenſe of the words, and conſtrue them in ſuch a manner, as will deduce a rational and conſiſtent meaning. Mankind often make uſe of figurative, and metaphorical expreſſions, which if literally taken, would be nonſenſe—but legiſlators ſhould be cautious how they run into this error; for it is not ſafe to leave courts to deduce their meaning from ſuch uncertain premiſes.

7. A common and univerſal method of aſcertaining the meaning of a law, when the words are dubious, is to conſider the reaſon and ſpirit of the law, or the cauſe which induced the legiſlature to make it; for it is a common maxim, that when the reaſon of a law ceaſes, the law itſelf ought to ceaſe. This method at firſt view, ſeems to be rational and well grounded. There may be many inſtances where a literal conſtruction will do injuſtice, and many where the caſe is within the meaning and deſign of the law, but not within the letter. Here it ſeems to be neceſſary to give courts a power of conſidering the meaning and ſpirit of the law, and of applying it accordingly. If the caſe be within the letter but not within the meaning, that they may ſo determine, or if without the letter, but within the meaning, ſpirit, equity, or miſchief, that they may extend the law to it. But this mode of conſtruing law, gives too great latitude to judges, and may be improved to oppreſſive purpoſes. It deſtroys that uniformity, certainty and preciſion, which are the eſſence of law. It throws the rights of mankind afloat, by placing them upon the arbitrary opinions and capricious whims of judges. The lawyer can never tell, how to adviſe his client, and the people cannot know the law. This rule therefore ſhould be admitted with great caution, and practiſed upon with great prudence.

8. *w* Penal Statutes are always to be conſtrued ſtrictly, for the benefit of the ſubject. Nothing more is to be deduced from the words, than what they expreſsly warrant, and they are not to be extended by implication. Thus the ſtatute which renders it a capital crime for a woman to conceal the death of a baſtard child, either by drowning, or ſecret burying, or any other way, muſt be confined to the only methods of concealment expreſſed by the ſtatute, and the words "any other way," are void for uncertainty.

9. Statutes not penal, and which merely concern property, are to be expounded liberally, ſo as to anſwer the deſign of the legiſlature. The expreſſions like thoſe which are void, in the abovementioned penal ſtatute, would where the ſtatute was not penal, be extended to remedy the inconvenience for which the ſtatute was intended.

10. Every part of the ſtatute muſt be ſo conſtrued, that if poſſible the whole muſt be allowed to ſtand. Thus any ſeeming contradiction muſt be reconciled by the manifeſt deſign and intent of the legiſlature.

11. A ſaving inconſiſtent with the body of the ſtatute is void.

12. Where the common law and ſtatute differ, the latter ſuperſedes and annuls the former.

13. Later ſtatutes, abrogate and repeal prior contrary ſtatutes. This muſt be underſtood where the ſtatutes are expreſsly contrary, or negative words are uſed, otherwiſe, if both the ſtatutes can be reconciled, they muſt ſtand, and have a concurrent operation.

14. If a ſtatute repealing another, be afterwards repealed, the firſt ſtatute is revived without any expreſs words, by mere implication.

15. Statutes calculated to diminiſh or reſtrain the power of any ſubſequent aſſembly, are of no validity, for each aſſembly muſt poſſeſs equal authority—of courſe they cannot limit or controul each other.

16. Statutes it is ſaid, which are repugnant to the principles of

w Black. Com.

of juſtice, and the dictates of common ſenſe, are void: and ſo are all ſtatutes ſubverſive of the fundamental principles of the conſtitution, with which no legiſlature has any right to interfere. It is contended that it is neceſſary that there be ſome reſtrictions and limitations to govern and controul the legiſlative power: that there muſt reſt in the people a right to guard the conſtitution, and in judges a power to reſtrain the operation of unjuſt and unreaſonable laws. It is conſidered by ſome writers, that only the conſequences ariſing collaterally from a ſtatute, that are abſurd or unreaſonable, are void; but that if the legiſlature expreſsly paſs an act, that is unreaſonable, no court has a right to reject it, becauſe this would elevate the judicial above the executive power. It is ſaid by others, that tho the legiſlature is ſovereign and ſupreme in all matters within their juriſdiction, yet they are governed by the principles of the conſtitution, the rules of juſtice, and the dictates of reaſon; that when they exceed theſe limits, their acts are of no validity. Judges are not bound to conform to them in their determinations, and the people are not bound to yield them obedience.

This idea, tho very popular and very prevalent, requires ſome conſideration. It is true that it may be ſaid, that if there be no bounds ſet to the power of the legiſlature, in conſtruing the conſtitution, that they may encroach upon the rights of the people; they may paſs laws requiring things immoral and unjuſt, and they may deſtroy the conſtitution; that therefore, in ſuch caſes, the judiciary, ſhall have the power to declare ſuch laws to be unconſtitutional and void. A caſe may be ſtated, that the legiſlature paſs an act requiring the people to commit ſome crime, authoriſing a court to condemn a man for a crime without evidence, or eſtabliſhing their ſeats during life. In ſuch caſes the law would be ſo manifeſtly unconſtitutional that it would ſeem wrong to require the judges to regard it in their deciſions.

In like manner it may be ſaid, and with equal truth, that the judiciary granting them this power, may adjudge and declare certain laws which are clearly within the conſtitution, and which are neceſſary to preſerve the public ſafety, to be unconſtitutional and void. It will be agreed, that it is as probable that the judiciary

will declare laws to be unconſtitutional which are not, as it is, that the legiſlature will exceed their conſtitutional authority. It is poſſible that the legiſlature and the judiciary, will make ſuch encroachments on each other, on the conſtitution, and on the rights of the people, but it cannot be called probable. A little reflection will make it evident, that no queſtion will ever ariſe in very clear caſes: where the point is really doubtful a queſtion may ariſe.—There may be ſome inſtances where good men may very honeſtly differ reſpecting the conſtruction of the conſtitution, becauſe from the imperfection of language, the expreſſions may be ambiguous. It is therefore only with reſpect to ſuch queſtionable points, that we are to conſider who ought to be veſted with the power of ultimate deciſion, and not in thoſe extreme caſes which may eaſily be ſtated, but probably never will happen. A few conſiderations will determine where this power ought to be placed.

The legiſlature muſt be conſidered as the ſupreme branch of the government. Previouſly to their paſſing any act, they muſt conſider and determine whether it be compatible with the conſtitution. Being the ſupreme power, and bound to judge with reſpect to the queſtion, in the firſt inſtance their deciſion muſt be final and concluſive. It involves the moſt manifeſt abſurdity, and is degrading to the legiſlature, to admit the idea, that the judiciary may rejudge the ſame queſtion which they have decided; and if they are of a different opinion, reverſe the law, and pronounce it to be a nullity. It is an elevation of the judiciary over the heads of the legiſlature; it veſts them with ſupreme power, and enables them to repeal all the laws, and defeat all the meaſures of the government. Whenever a law is paſſed by the legiſlature, the firſt buſineſs of the courts will be to decide whether it be conſtitutional and valid. The loweſt courts muſt permit the queſtion to be ſeriouſly and deliberately agitated before them, reſpecting the validity of the law, and then they muſt ſolemnly decide, whether an act paſſed by the ſupreme legiſlature be conſtitutional and obligatory on the people. Indeed the neceſſary conſequence is, that no law paſſed by the legiſlature, can be deemed binding, till it has received the ſanction of the ſupreme judiciary, and has been declared to be conſtitutional. The lower

courts

courts may decide differently, and the obligation to obey a law may be uncertain, till ſome individual brings the queſtion before the ſupreme tribunal for ultimate deciſion. Where this tribunal is compoſed of one branch of the legiſlature, perhaps no danger could ariſe, becauſe they muſt have previouſly in their legiſlative capacity, have decided the law to be conſtitutional: but where the judiciary are independent of the people and the legiſlature, and hold their offices by an appointment of the ſupreme executive, it is a total proſtration of the government, to veſt them with a power of deciding that legiſlative acts are null. The legiſlature will loſe all regard and veneration in the eyes of the people, when the loweſt tribunals of judicature are permitted to exerciſe the power of queſtioning the validity, and deciding on the conſtitutionality of its acts—A principle ſo dangerous to the rights of the people, and ſo derogatory to the dignity of the legiſlature, cannot be founded in truth and reaſon.

All theſe inconveniencies are avoided by placing the ultimate right of deciſion in the ſupreme power of the land. The legiſlature have the ſole power of making laws. The judiciary, have the ſole power of expounding them, but they have no power to repeal them. The legiſlature are not under the controul or ſuperintendence of the judiciary—if they paſs laws which are unconſtitutional, they are reſponſible to the people—who may in the courſe of elections diſmiſs them from office, and appoint ſuch perſons as will repeal ſuch unconſtitutional acts. On this power of the people over the legiſlature, depends their ſecurity againſt all encroachments, and not on the vigilance of the judiciary department.

Such are the outlines of our code of laws: in addition to which we have a ſyſtem of equitable rules, to moderate and ſoften the rigor, and ſupply the defects of the laws. No government can ſtand on a firm baſis, unleſs the laws are uniform in their principles, and univerſal in their operation. But from theſe general rules, there may be ſome inſtances, where individuals may in particular caſes, be unable to obtain compleat juſtice, and there will be ſome caſes to which general rules will not extend. This points out the neceſſity of courts of equity, who have power to relieve againſt the

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indirect unjuſt operation of general laws, and to furniſh relief in all caſes, where the ordinary courſe of law does not extend.

To purſue our enquiries with facility and perſpicuity, it is neceſſary to exhibit a general plan of the work.

Government is inſtituted to maintain the rights, and redreſs the wrongs of individuals. We ſhall therefore in the firſt place delineate the form of the government, conſiſting of the legiſlative, executive and judicative powers. In the ſecond place we ſhall conſider the rights of perſons, which will be divided into abſolute, and relative; abſolute, belonging to them as individuals, and relative as connected with their fellow-creatures.

The principal of theſe rights reſpect property, we ſhall therefore in the third place, define the ſeveral kinds of things, and their mode of conveyance. Mankind, when ſecure in the enjoyment of theſe rights, are in a ſtate of political happineſs; but as their repeated violation calls on government, for a conſtant exertion to redreſs them, it is neceſſary to conſider in the fourth place what acts amount to an infraction of them, ſo as to be denominated wrongs, and the modes of redreſs. As the conduct of individuals, not only affects each other, but concerns the peace, and good order of government, we ſhall in the fifth place conſider thoſe actions, which are denominated crimes, becauſe they diſturb the peace, interrupt the good order, and endanger the exiſtence of the community. To this will be added the mode of proſecution, and the various kinds of puniſhments for each offence. From the general operation of univerſal laws, ſome individuals under certain circumſtances, may ſuffer injuſtice, as an indirect, collateral conſequence of them, and it cannot be expected that poſitive laws will reach every poſſible caſe, and redreſs every poſſible injury. We ſhall therefore in the ſixth place, conſider the powers of courts of equity, inſtituted, and calculated, to ſupply the defects, and remedy the inconveniencies of general laws.

A SYSTEM of the LAWS
OF THE
STATE of CONNECTICUT.

BOOK FIRST.

Of the Powers of Government.

CHAPTER FIRST.

OF THE CONSTITUTION OF CONNECTICUT.

THE conſtitution of this ſtate, is a repreſentative republic.—Some viſionary theoriſts, have pretended that we have no conſtitution, becauſe it has not been reduced to writing, and ratified by the people. It is therefore neceſſary, to trace the conſtitution of our government to its origin, for the purpoſe of ſhewing its exiſtence, that it has been accepted and approved of by the people, and is well known and preciſely bounded.

Antecedent to the ſettlement of America, the king of England made ſundry grants of territory to individuals. Our anceſtors purchaſed the lands in the limits of Connecticut, of the grantees of the crown, and the Indian natives. Embarking in the enterpriſe without the royal aid, or encouragement, no form of government was preſcribed. Too remote from their native country to be governed by their laws, they were under a neceſſity of framing a conſtitution and laws for themſelves. In this reſpect, they were in a ſtate of nature, and had the right, as well as the power of purſuing thoſe liberal ideas of civil liberty, which had impelled them to undertake ſuch an hazardous enterprize. Within the limits of this ſtate, two colonies, ſettled about the ſame period.— [a] In the year 1635,

[a] Neal's Hiſt. N. E.

a number of perſons from Maſſachuſetts, invited by the fertility of the land adjoining Connecticut River, made a ſettlement on its banks, and erected the town of Hartford, and the neighbouring towns. [b] In the year 1637, a colony from England, made a ſettlement at New-Haven. Sundry towns on Connecticut River, and the ſettlement at New-Haven, were without the juriſdiction of Maſſachuſetts, or any government. They were in a political point of view, in a ſtate of nature, and had a right to eſtabliſh ſuch form of government as they pleaſed. Senſible of the advantages of ſociety, and the neceſſity of government, they at each ſettlement, agreed upon and ſubſcribed certain articles, by which they voluntarily entered into a ſtate of ſociety, formed the ſocial compact, and erected two governments, Connecticut and New-Haven, which continued ſeparate, till their union by the royal charter, in 1662. Theſe colonial governments, derived their authority from the voluntary aſſociation and agreement of the people, and we have here the moſt ſingular, and the faireſt example of the operation of that natural principle, which impels mankind to unite in ſociety. Here the ſocial compact was made and entered into, in the moſt explicit manner. Here is the origin of a government upon natural principles.

But it being a common opinion, that new diſcovered land belonged to the king, whoſe ſubjects had diſcovered them, and that he alone had the right and the power to eſtabliſh legal governments, and grant the title to the lands, the colonies of Connecticut and New-Haven, made application to Charles the ſecond, king of Great-Britain for a charter. The king granted them a liberal and extenſive charter, dated, April 23d, 1662, that incorporated both colonies into one, by the name of Connecticut, that erected a form of government, upon the ſame plan they had before voluntarily adopted, and that granted them a title to the territory within the limits of the colony. The application of the people for this charter, and their voluntary acceptance of it, gave efficacy to the government it conſtituted, and not the royal ſignature. This is the only charter that ever was granted by an Engliſh monarch to the people of Connecticut, and is now by ſtatute the baſis of our conſtitution. It

continued

[b] Douglaſs's Hiſt. of Connecticut.

continued in force, till the declaration of Independence diſſolved our connexion with Great-Britain, and raiſed us to the rank of a ſovereign ſtate.

Had the charter of Charles II. been conſidered as the baſis of the government of Connecticut, the declaration of independence which annulled it would have placed the people in a ſtate of nature, with the privilege of erecting ſuch a form of government as they thought eligible. Indeed no form of government could have been valid, unleſs approved, and adopted by the people in convention, or in ſome other way. It is alſo unqueſtionably true, that in conſequence of the diſſolution of the political connection with Great-Britain, the people of this ſtate had a right, if they had thought proper, to have exerted it, to have met in convention, and eſtabliſhed a different form of government. But at the declaration of independence, the ſubject was conſidered in a different light. The authority of the government was ſuppoſed to have originated from the aſſent of the people, and never to have been dependent on the royal charter. During the whole period of the exiſtence of the colonial government, Connecticut was conſidered, as having only paid a nominal allegiance to the Britiſh crown, for the purpoſe of receiving protection and defence, as a part of the Britiſh empire: but always exerciſed legiſlation reſpecting all the internal concerns of the community, to the excluſion of all authority, and controul from the king, and parliament, as much as an independent ſtate. Acts of parliament were not deemed binding here, and the aſſent of the king, and parliament, was not neceſſary to give efficacy to our ſtatutes. The neceſſary conſequence was that the renunciation of allegiance to the Britiſh crown, and the withdrawing from the Britiſh empire, did not in any degree affect, or alter the conſtitution of the government. The conſtitution which originated from the people, and had been practiſed upon, continued in operation, after the declaration of independence, in the ſame manner as before, and was equally valid. The people were only diſcharged from a nominal allegiance to the Britiſh crown, which they had recognized for the purpoſe of protection, and defence. Theſe being withdrawn by Great-Britain, and war made upon them, they had a right to enter into a confederacy with any other ſtates for the purpoſe

of mutual defence: but their internal government remained unaltered, and the ſame. The general aſſembly which convened next after the declaration of independence, proceeding on this principle paſſed all the laws that were neceſſary to carry into effect, the conſtitution of the government on the original baſis. They ratified, and confirmed the declaration of independence, they paſſed an act recognizing the ancient form of government, they made ſuch alterations, and introduced ſuch amendments, as the change of circumſtances required. If the principles before ſtated are true, then the conduct of the legiſlature was conſtitutional, and there was no neceſſity of calling a convention of the people, to agree on the form of the government.

But if it be admitted that the royal charter was the ſole baſis of the colonial government, then it muſt be acknowledged that the diſſolution of our connection with Great-Britain, annulled the conſtitution, and reverted the people to a ſtate of nature. The legiſlature under ſuch circumſtances had no power to act under the former conſtitution, and their acts were unconſtitutional, having no binding authority on the people. But admitting this to have been true at the time, yet the ſubſequent conduct of the people, in aſſenting to, approving of, and acquieſcing in the acts of the legiſlature, have eſtabliſhed, and rendered them valid, and binding, and given them all the force, and authority of an expreſs contract. For there is no particular mode pointed out, by which the aſſent of the people to any particular form of government, is to be obtained. It may be expreſſed by delegates choſen for that purpoſe, to meet in convention, or it may be implied by a tacit acquieſcence, and approbation.

Thus when we trace our government to its origin, we find it to reſt upon a conſtitution, which was the voluntary contract of the people, and which has been ratified, confirmed, and approved by all ſucceeding ages. Our tranſition from a ſtate of political ſubjection to Great-Britain, to independence, and ſovereignty, was almoſt imperceptible. Tho we were witneſſes to a moſt ſingular revolution, yet we experienced no commotions among the people, and no convulſion in our domeſtic government. Our legiſlature

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was never interrupted in their buſineſs, and they proceeded with the ſame calmneſs, and under the ſame form of government, to exert their powers, to repel the encroachments, and oppreſſion of Great-Britain, as they did in the ordinary affairs of legiſlation, when they acknowledged her ſupremacy.

[e] The ſtatute containing an abſtract and declaration of the rights and privileges of the people, and ſecuring the ſame, enacts, that the ancient form of civil government, contained in the charter of Charles the ſecond, king of England, and adopted by the people of this ſtate, ſhall be and remain the civil conſtitution, under the ſole authority of the people, independent of any king or prince whatever. And this republic ſhall forever be and remain, a free, ſovereign and independent ſtate, by the name of the State of Connecticut. By this ſtatute, the people are expreſsly conſidered to be the origin and fountain of power. All government is derived from them, and is to be directed only to the promotion of their welfare. No individual is elevated high in rank above the reſt, by the ſplendor of titles and enſigns of royalty, in whoſe majeſty is placed the power of government; but this power is veſted in the majeſty of the people.

The people poſſeſs all the power that can ſafely be veſted in them in their collective capacity, and all that is neceſſary to guard and ſecure their rights. They elect the ſupreme, ſovereign authority of the government. The frequent opportunities of diſplacing their rulers, by annual elections, give them a moſt effectual reſtraint upon their conduct, and fix the firmeſt barrier of their liberties.

The powers of government are lodged in three bodies—the legiſlative, the executive, and the judicative. The legiſlature is compoſed of two branches, the governor, the lieutenant-governor, and the twelve aſſiſtants, elected annually by the people, and called the council. The repreſentatives from the ſeveral towns, choſen twice a year, and called the houſe of repreſentatives. Theſe two branches are called the general aſſembly or court; they convene twice a year; they hold their deliberations in different apartments, and no act is valid without the concurrence of both. They

[e] Statutes of Connecticut, page 1.

are emphatically called the ſupreme power of government. They can enlarge, diminiſh and controul the juriſdiction and authority of the other powers; they can make and repeal laws; they appoint the civil and military officers, and can do all the acts of a ſovereign independent ſtate.

The executive power is lodged in the hands of the governor, who is diſtinguiſhed as the ſupreme executive magiſtrate; the governor and council, the treaſurer, the comptroller and the ſecretary.

The judicative power, is veſted in the governor, the lieutenant governor, and the council, who are denominated the ſupreme court of errors, and are the dernier reſort in all matters of law; and the ſuperior court conſiſting of five judges appointed by the general aſſembly, and whoſe juriſdiction extends through the ſtate.

Theſe may be conſidered as the ſupreme powers of the government. Their authority is general, extending to every part of the republic, and relating to the whole collective body, as one great corporation. But as a ſtate, comprehending ſo large an extent of territory, cannot be governed and regulated like a ſmall republic, it has been found neceſſary to make ſundry diviſions and ſub-diviſions, for the purpoſe of facilitating and expediting the diſtribution of law and juſtice, to every individual, and through every part of the ſtate. On this account the ſtate has been divided into counties, probate diſtricts, towns and ſocieties. This has opened the door for the eſtabliſhment of ſubordinate officers, whoſe power is confined to the ſeveral diviſions for which they are appointed.

The ſubordinate officers in the executive department are the ſheriff, who is appointed by the governor and council, whoſe duty it is to preſerve the peace of the county. Juſtices of the peace, appointed by the general aſſembly in the ſeveral towns, to preſerve the peace of the county, but their authority is chiefly of a judicial nature.

The ſubordinate judicative power, conſiſts of ſeveral courts of inferior and local juriſdiction. The courts of common pleas in each county; courts of probate in each diſtrict, and juſtices of the peace in every town, who have juriſdiction through the county.

Towns

Towns are conſidered in the nature of corporations, their powers reſemble thoſe of a pure unmixed democracy. The inhabitants have a right to aſſemble together, they poſſeſs a ſmall ſhare of legiſlative authority, they have a right to paſs votes reſpecting the internal affairs of the town, under certain reſtrictions and limitations, they appoint proper officers to manage the concerns of the town. Theſe corporations are an important branch of the executive, and are calculated to regulate thoſe minute and ſubordinate concerns of the people, which cannot be reached in very large corporations.

Societies are inſtituted for religious, or eccleſiaſtical purpoſes, and are veſted with the power of appointing proper officers, and ſupporting public worſhip.

Theſe are the civil powers of the ſtate, but as mankind are expoſed to foreign invaſions, and internal inſurrections; and are ſometimes obliged to defend their lives, and fortunes, by arms, a military power is inſtituted for that purpoſe. This power is ſubordinate to the civil, and conſiſts of the citizens within certain ages and deſcriptions. The governor is captain general, or commander in chief, the lieutenant governor is lieutenant general, and there is a proper gradation of officers thro every ſubordinate rank. On the ſtrength and bravery of this militia, the ultimate ſafety of the republic depends when the appeal is to arms.

Such are the outlines of our conſtitution, and form of government. The minuter branches, and ſubdiviſions, will be fully conſidered, when we come to treat of theſe ſubjects in detail.

The ultimate object, and ſcope of the conſtitution, are the ſafety, and happineſs of the people, by the ſecurity, and preſervation, of political liberty. It has therefore been enacted by ſtatute, that no man's life ſhall be taken away; no man's honor, or good name ſhall be ſtained; no man's perſon ſhall be arreſted, reſtrained, baniſhed, diſmembered, or any ways puniſhed; no man ſhall be deprived of his wife, or children; no man's goods or eſtate ſhall be taken away from him, nor any ways indamaged, under the color of law, or countenance of authority, unleſs clearly warranted by the laws of the land. This may be called the great charter of the people, and is

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an ample declaration, and bill of rights. In the courſe of our enquiries we ſhall find that ſufficient proviſion has been made for their ſecurity, and legal remedies deviſed to furniſh redreſs when they are infracted.

A queſtion of importance has been agitated reſpecting the power of a legiſlature, to alter the conſtitution of a ſtate. But it is generally agreed, that where a conſtitution has been framed by the people at large, by convention appointed for that purpoſe, or by the tacit agreement of the people, that no legiſlature has the power to alter it, and that the right reſts in the people alone. This is a prudent precaution againſt any attempts in the legiſlature, to extend their authority, and eſtabliſh deſpotiſm. It however retards the progreſſive improvement of government, by rendering neceſſary a recurrence to the people, to introduce every amendment, which experience may prove to be expedient. A conſtitution therefore that is unalterable by the legiſlature, ſhould contain nothing but the outlines of the government, and leave it to the legiſlature to fill up the minuter parts, which will always authoriſe them to vary it according to the progreſs of improvement.

The conſtitution of the ſtate of Connecticut is unalterable by the legiſlature in every reſpect, that is neceſſary to its preſervation, and at the ſame time permits the legiſlature to make alterations, wherever improvements can be introduced. It is unalterable in theſe reſpects, that it cannot be changed from a repreſentative republic ; that the people cannot be deprived of the rights of an annual election of one branch of the legiſlature, and of a ſemi-annual election of the other : that the number of repreſentatives cannot be leſſened ; that the legiſlative power cannot be exerciſed, but in the two branches ; that two aſſemblies muſt be holden annually. While theſe principles are adhered to, there is not the remoteſt danger, that the government will verge to tyranny. But in the executive and judicative departments, and perhaps, in almoſt every other reſpect, not enumerated, the legiſlature have from time to time, the power of making ſuch alterations, as wiſdom may dictate and the happineſs of the people require.

Chapter Second.

OF THE LEGISLATIVE POWER.

THE legiſlative power is lodged in the General Aſſembly, which is compoſed of two branches, called the Governor and Council; and the Houſe of Repreſentatives. To treat of this ſubject with clearneſs, I ſhall diſtribute it under the following heads. Firſt, to conſider each branch diſtinctly, with their peculiar and ſeparate rules, and cuſtoms. Secondly, the mode of election, with the qualifications of electors, and elected. Thirdly, the privileges of the members of aſſembly. Fourthly, the time, place, and manner of their meeting. Fifthly, their power and juriſdiction, with their rules and cuſtoms. Sixthly, their method of making ſtatutes, and proceeding in private matters. Seventhly, their adjournment, and diſſolution.

I. I am to conſider each branch diſtinctly with their peculiar rules and cuſtoms—and [d]

1. Of the Council, which conſiſts of the governor, the lieutenant-governor, and twelve aſſiſtants. The governor is elected annually by the freemen. He does not conſtitute a diſtinct branch, having a negative upon the other two, as in ſome ſtates; but he is a member of one branch; he is conſidered the higheſt official character in the ſtate, he preſides in the council, he has the power of voting in all matters, and where there is an equi-vote, he has a double vote, or caſting voice. The lieutenant-governor, ſits in the council with the right of voting, and in caſe of the death, or abſence of the governor, he preſides, with the right of a caſting voice, in caſe of an equi-vote. The twelve councillors, or aſſiſtants, are annually elected by the freemen, they ſit in the ſame apartment with the governor, and lieutenant-governor, and no act can paſs but by the major vote. The governor and lieutenant-governor, or either of them, with ſix aſſiſtants, conſtitute a ſufficient number to tranſact buſineſs. If the places of the governor and lieutenant-governor be vacant, or they be abſent, the ſenior councillor preſides, who with ſix aſſiſtants are authoriſed to proceed in buſineſs. They muſt take the oath to ſupport the conſtitution of the United States, and the oaths preſcribed by ſtatute.

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[d] Statutes, p. 27.

2. [e] The Houſe of Repreſentatives is compoſed of repreſentatives, elected by the freemen of the ſeveral towns in the ſtate. The freemen of each town have a right to elect one, or two repreſentatives, to repreſent them in every general aſſembly, that is holden. They meet in a ſeparate apartment from the council. Forty members muſt convene before they can proceed to buſineſs. They chooſe a ſpeaker, who preſides in the houſe, with the privilege of a caſting voice when an equi-vote happens. They chooſe a clerk who is ſworn, and whoſe duty is to make proper entries of all their doings, and tranſmit to the other houſe all bills, and petitions that ought to be tranſmitted. The members muſt take the oath to ſupport the conſtitution, and the oath of repreſentatives preſcribed by ſtatute. When the houſe is thus formed, they become veſted with certain powers and prerogatives, independent of any ſuperior. Their deciſions and determinations are examinable in no other court. They may puniſh their members for miſconduct, before the houſe, by paſſing a vote of cenſure; by a reprimand of the ſpeaker, by commitment for contempt, or by expulſion. They may examine, hear, and determine any difference that ſhall ariſe about the election of any of their members, and may determine who is, and who is not elected. They may examine the qualifications of the members, and if any perſons are returned, who are not freemen, or who have obtained their election by bribery and corruption, contrary to the ſtatute law, they may expel them. They can never expel a member for any act done previouſly to his election, unleſs it be a crime that rendered him ineligible. If a man after his election commit a crime that diſqualifies him to be elected, there is a propriety, that the houſe ſhould have the power to expel him. They have no power to examine, or cenſure a perſon for conduct before his election, that did not diſqualify him to be elected. The people have a right to be repreſented by any perſon not expreſsly excluded by law; and the houſe of repreſentatives, cannot judge reſpecting the propriety of their choice, nor throw a ſtigma upon the character of the perſon elected. The whole power of expulſion is confined to three caſes, miſconduct in the houſe, or the commiſſion of crimes that render the perſon ineligible, or bribery and corruption in obtaining the election. In their deciſions they are bound to conform

[e] Statutes 37.

form to the laws in being. The houſe have certain ſtanding rules and orders, which are read at the opening of every ſeſſion of aſſembly, that are calculated to introduce regularity in proceeding, decorum in debate, and to ſupport the dignity of the houſe.

II. Of the mode of election, and the qualifications of electors and elected, and *f*

1. I ſhall conſider the mode of election. This buſineſs is conducted in the meeting of the freemen, in the ſeveral towns in the ſtate, annually in April and September. The conſtables of the town warn the meetings, and the votes are to be taken by an aſſiſtant or juſtice of the peace, if any are preſent, otherwiſe by the conſtables; but the practice is in ſome towns for the civil authority to take the votes, and in ſome towns the conſtables. In the meetings held in the ſeveral towns in the ſtate, on the Monday next following the firſt Tueſday in April, the freemen make choice of the governor, and lieutenant-governor, in the following manner. Every freeman writes on a piece of paper, the name of the perſon for whom he votes, and the ſame preſents to the preſiding authority, who, on receiving the ſame, ſhall in the preſence of the freemen ſeal them up, and thereon write the name of the town and votes for the governor, and in like manner for the lieutenant-governor. The preſiding authority ſhall either by themſelves, or the repreſentatives of the town, convey them to Hartford, and at the election deliver them to thoſe perſons who are appointed by the general aſſembly a committee to receive, ſort and count ſaid votes. The general court of election is holden at Hartford on the ſecond Thurſday of May annually, and the perſons who have a majority of votes, are declared to be elected governor, and lieutenant-governor: but in caſe there be not a majority of votes in favour of any perſon, then there is no election by the freemen, and they are to be choſen by the aſſembly.

g The aſſiſtants are choſen in the following manner. At the freemen's meeting in the ſeveral towns in the ſtate, holden annually on the third Monday of September, every freeman may give in his vote for twenty perſons, their names being fairly written

f Sect. 3, p. 44. *g* Ibid. p. 44, 45.

written on a piece of paper, whom he judges qualified to ſtand in nomination for election, the May enſuing, which he ſhall preſent to the civil authority, or conſtables preſent: who ſhall enter the names of the perſons voted for, with the number of their votes, a copy of which they ſhall ſend ſealed up, to the general aſſembly at New-Haven, holden on the ſecond Thurſday of October, by the repreſentatives of the town. At which aſſembly the votes ſhall be compared, and the twenty perſons who have the greateſt number of votes, ſhall be the perſons whoſe names ſhall be returned to the ſeveral towns, as ſtanding in nomination for the next election; out of which number the twelve aſſiſtants ſhall be choſen. At the freemen's meeting, holden in May as before mentioned, every freeman has a right to vote for twelve of the perſons nominated to be aſſiſtants, in the following manner. The preſiding authority are to begin with the perſon who ſtands firſt in nomination, and the freemen are to bring in their votes * on a written piece of paper to them who ſhall ſeal them up, and write thereon the names of the perſons voted for, Each freeman having a right to vote for twelve of ſaid perſons. Theſe votes are to be tranſmitted to Hartford, in the ſame manner as votes for the governor; and the twelve perſons who ſhall have the greateſt number of votes, ſhall be declared to be elected aſſiſtants for the enſuing year.

The repreſentatives are choſen twice a year, at each of the freemen's meetings above mentioned. Each town has a conſtitutional right to ſend one or two, as they think proper, excepting ſome towns which have been incorporated ſince the revolution, that are reſtricted to one repreſentative. The method is for every freeman to give his vote to the preſiding authority, by preſenting the name of the perſon he votes for, written on a piece of paper, and the perſon who has a majority of votes is declared to be elected.

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* It is not neceſſary that the name of the perſon voted for, ſhould be written on the paper, but that there ſhould be ſome writing on the paper, for if it be blank, it will not be counted. This proviſion is ſaid to have been made for this purpoſe: If any perſon in nomination ſhould be in a freemen's meeting, and any freeman ſhould not incline to vote for him, and at the ſame time was unwilling he ſhould know it, he might give in a blank, and it could not then be known whether he voted for him, or not. This was intended to give the freemen a chance to vote according to their opinions, without being biaſſed, or overawed by men in office.

[b] The peace, proſperity, and ſecurity of a republican government depend on the fairneſs and freedom of elections. Where theſe are controuled by undue influence; and bribery, and corruption prevail, the conſtitution is in danger of being ſubverted. On this principle, our laws have wiſely guarded againſt them, by enacting—that no perſon ſhall offer to another, any written vote for any member of the legiſlature, unleſs firſt requeſted, upon penalty of forty ſhillings, and that no perſon ſhall offer or accept any reward directly or indirectly, for voting or not voting, for any member of the legiſlature, on penalty of five pounds, and on conviction of a ſecond offence, to be puniſhed by diſfranchiſement. And that ſuch perſon as ſhall be elected by ſuch illegal practices, ſhall be incapable of ſerving in ſuch aſſembly, unleſs he can ſatisfy them that it was done without his privity, and that he had not directly or indirectly any concern therein.

But theſe laws are a feeble barrier againſt the influence of bribery and the arts of intrigue, in compariſon with that which is derived from the opinion and the virtue of the people. In almoſt every country where the people have poſſeſſed the right of election, bribery and corruption have been introduced, and electioneering has prevailed. The candidates appear publickly, and ſolicit the votes of the electors. In England, months are ſpent in canvaſſing towns and counties, the baſeſt arts of intrigue are practiſed, the country becomes a ſcene of riot and diſſipation, and thouſands are expended in procuring an election. In the neighbouring ſtates it is not uncommon for perſons to ſet themſelves up for candidates, and call on their friends for their votes and influence.

The corruption and diſorder uſually attendant on popular elections, have not only diſgraced the people, but have brought an odium on repreſentative governments, and have given too much colour to an opinion, that the people are unworthy that ineſtimable privilege which they are ſo willing to abuſe, and are ſo eaſily induced to betray. It is therefore eſſential to the ſecurity of a repreſentative government, that we not only ſecure to the people the rights of election, but that we alſo inſpire them with proper ſentiments to exerciſe it for their own happineſs and welfare.

[b] Statutes, 46.

In this ſtate, no inſtance has ever been known where a perſon has appeared as a public candidate, and ſolicited the ſuffrages of the freemen, for a place in the legiſlature. Should any perſon have the effrontery or folly to make ſuch an attempt, he may be aſſured of meeting with the general contempt, and indignation of the people, and of throwing an inſuperable bar in the way of attaining the object of his purſuit.

Theſe nice and delicate feelings of the people reſpecting elections, conſtitute the firmeſt bulwark of our excellent conſtitution. It is a ſentiment that ought to be engraved on the hearts of every individual, that it is their indiſpenſible duty to confer their ſuffrages on the moſt worthy and reſpectable characters in the community, and that the man who is guilty of the baſe arts of intriguing, and electioneering, is unworthy the confidence of the people, and unfit for an office in the government. Every candidate for public honors, ought to have this ſentiment indelibly impreſſed on his heart, that the obtaining of an office by the baſe arts of intrigue and electioneering is a perſonal diſgrace: and that there is no true glory, in an elevation to the moſt important ſtation, in a government, unleſs the ſuffrages of the people can be conſidered as a voluntary tribute of reſpect to acknowledged merit, and praiſe-worthy conduct.

The freedom of our elections is ſtrongly ſupported by their frequency, and the number of the repreſentatives. No perſon will find his account in taking much pains for elections, which ſo frequently happen, when the large number of the legiſlature diminiſh the perſonal influence and importance of each individual, to a narrow compaſs. Great has been the rage for ſometime paſt of leſſening the repreſentation, to ſave expenſe and expedite buſineſs. Experience will demonſtrate that the preſent large houſe of repreſentatives, diſpatch public buſineſs with more celerity, than ſmaller bodies, and there is no doubt, but that a diminution of their number would ſoon lead the way to an augmentation of their trifling wages, ſo that no ſaving of expence would be obtained. While no inconvenience is experienced, why ſhould the repreſentation be leſſened, which would deprive a number of perſons of the opportu-

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nity of obtaining that information, concerning public affairs, by attending the general aſſembly, which enlarges their own minds, and enables them to diſſeminate political knowledge among the people.

2. I am to conſider the qualifications of the electors, [i] who muſt be freemen, and for that purpoſe muſt be inhabitants of ſome town, of twenty one years of age, poſſeſs a freehold eſtate to the value of forty ſhillings per year, or forty pounds perſonal eſtate in the liſt, in that year wherein they deſire to be admitted, or poſſeſs ſuch eſtate, and be excuſed from putting it into the liſt, and be of quiet and peaceable behaviour, and civil converſation. Such perſons may apply to the ſelectmen of the town, where they belong and on procuring a certificate from the major part, that they are qualified, any aſſiſtant or juſtice of the peace, is empowered to adminiſter the oath in open freemen's meeting, legally aſſembled, and their names are to be enrolled in the office of the town clerk. Every perſon while he continues a freeman, has a right to vote for every public officer, and continues a freeman, notwithſtanding any reduction in point of property : but for ſcandalous behaviour and infamous offences, the ſuperior court may diſfranchiſe him, and on reformation, may reſtore him. The ſelectmen are liable to a penalty of three pounds ſix ſhillings, for making a falſe certificate, but if a perſon is admitted a freeman on ſuch falſe certificate, he is not diſfranchiſed by a conviction of the ſelectmen. A queſtion has been ſtarted, reſpecting the juſtice of excluding a perſon from the rights of a freeman, on account of his poverty. It is ſaid that no perſon ought to be admitted to vote for the rulers, unleſs his circumſtances in life, raiſe him above the danger of being influenced by the power of bribery and the arts of intrigue. Perhaps, property is not the moſt effectual ſafeguard againſt corruption, and that fairneſs of character, would afford a juſter rule of diſcrimination, than the quantum of property. But in this ſtate, of ſo little value is the eſtate requiſite to qualify a perſon to be a freeman, that no inconvenience has been experienced by it.

3. Of the qualifications of perſons to be elected members of the legiſlature. [k] Every freeman is eligible of common right, excepting

[i] Statutes, 88. [k] Ibid.

ing thoſe, who hold certian offices which are deemed incompatible with ſeats in the legiſlature, and have been expreſsly excluded by ſtatute. *l* Theſe are judges of the ſuperior court, *m* and thoſe officers under Congreſs, who are excluded from ſeats in the legiſlature of the United States. No ſtatute has pointed out a crime which diſqualifies a freeman to be elected into either branch of the legiſlature. No ſtatute authoriſes the expulſion of a repreſentative who is a freeman, if he be not unduly elected. The ſtatute ſays, that no perſon ſhall be accepted as a repreſentative, unleſs he be a freeman. As the ſtatute law ſtands, every freeman, however infamous, is eligible into the legiſlature. *n* If we have recourſe to the common law, we ſhall find that no crimes render a perſon ineligible, but high treaſon, and felony. A houſe of repreſentatives, being only one branch of the legiſlature, can have no conſtitutional right to expel a member for any act done previouſly to his election, unleſs he is diſqualified by the common law, or by ſtatute.

III. The privileges of the members of aſſembly, next require our conſideration, and it is declared by ſtatute, *o* that no member ſhall during the ſeſſion of the general court, or in going to, or from ſaid court, be arreſted, ſued or impriſoned, or in any ways moleſted or troubled, or compelled to anſwer to any bill, plaint, declaration, or otherwiſe, before any court, judge or juſtice, caſes of high treaſon and felony excepted. All ſuch ſuits would abate, and the impriſonment would ſubject the proſecutor to an action of falſe impriſonment, and if the member ſhould be committed to goal, he might on information be diſcharged, by order of the houſe in the legiſlature to which he belonged.

Every member is entitled to the privilege of freedom of ſpeech in all debates, and cannot be called to account for it in any other court. Inſtances have happened, where actions of defamation have been brought for words ſpoken in the houſe of repreſentatives, and the court refuſed to ſuſtain them.

IV. Of the time, place and manner of their meeting—The ſtated times of meeting, are at Hartford, on the ſecond Thurſday of May, and at New-Haven on the ſecond Thurſday of October, annually. The houſe of repreſentatives meet at their chamber in the ſtate-

l Statutes, 374. *m* Ibid. 409. *n* 1 Black. Com. 17. 1 Bac. Abr. 576. 4 Inſt. 48. *o* Statutes, 28.

ſtate-houſe in Hartford at eight o'clock in the morning of the day of election, and proceed to the choice of a clerk, then a ſpeaker. The certificates of the election of the members are then produced and read, and their names enrolled. The clerk then adminiſters the neceſſary oaths, and the houſe is formed. A meſſage is then ſent by ſome of their members, to wait on his excellency the governor, and inform him that the houſe is formed. The governor and council, who hold their offices till the election is compleated, meet in the council chamber. The houſe of repreſentatives being formed, at the direction of the governor, both houſes proceed in proceſſion to the meeting-houſe, where a ſermon is delivered by ſome gentleman of the clergy appointed by the governor: a commendable practice, inſtituted by our pious anceſtors, at the time when they founded the government, and which their pious deſcendants have continued to the preſent time.

When public ſervice is ended, both houſes return in like proceſſion to their apartments, and appoint committees jointly to receive, ſort, and count the votes of the freemen, and declare the perſons duly elected. The committees of both houſes, meet and proceed to count the votes of the freemen, and declare who are choſen governor, lieutenant-governor, and aſſiſtants,—and the perſons elected, being ſworn the council is formed, and the general aſſembly becomes organized.

The repreſentatives on the ſecond Thurſday of October, at nine o'clock in the morning, meet at the ſtate-houſe in New-Haven, and proceed to form the houſe as at Hartford. The governor and council, having convened at the ſame time, the general aſſembly is again organized.

Thus by the conſtitution, there are two meetings of the legiſlature each year, to conſult and promote the welfare of the people. Beſides the ſtated annual meetings the conſtitution has provided a method of convoking the general aſſembly at other times, if occaſion requires. The governor, or in his abſence the lieutenant-governor, or the ſecretary, upon any emergent, or ſpecial occaſion, may call a general court upon fourteen days warning, or leſs if they think it needful, and they ſhall give an account thereof to the aſſembly when convened.

V. Of

V. Of the power and jurisdiction of the general assembly—and

1. Of their power in the public affairs. [p] The general assembly possess the supreme authority of the state; they have the power to make laws, and repeal them; to dispose of lands undisposed of, to towns or particular persons; to institute, and stile judicatories and officers, as they think proper; and to grant all public taxes, and lay duties for a revenue. They may call any court or magistrate, or any other officer or person whatever, to account for any misdemeanor, or mal-administration, and for just cause may fine, displace, or otherwise punish them, as the nature of the case requires. If no governor or lieutenant-governor be elected by a majority of the votes of the freemen, the general assembly have the power to elect them; and if after the election, by death or otherwise, the office of any of the assistants become vacant, the general assembly may supply it by election. They may grant pardons, suspensions, and goal delivery, upon reprieve, in capital and criminal cases, to any person that has been sentenced in any other court. They have the power of appointing the judges of the superior court, of the courts of common pleas, of probate, and the justices of the peace. They have the power of regulating the militia, under the authority of congress, and the appointment of the generals, the colonels and the majors, and the choice of commissioned officers in military companies must be by them approbated before they are valid.

Such are the powers of the assembly that are enumerated by statute; but by the nature of the constitution, they possess the power of doing, and directing, whatever they shall think to be for the good of the community. They may encourage literature, manufactures, commerce and agriculture, by bounties, or exclusive privileges. They have the power of erecting, and constituting corporations for these purposes. They may alter, or create counties, towns and societies.

In this body resides the supreme and sovereign authority, which is essential to the existence of civil government. It is difficult to define or limit its extent. It can be bounded only by the wants, the necessities, and the welfare of society. This power being

[p] Statutes, 27.

ing placed in a body, chosen by the people, and the individuals frequently reverting to a state of citizenship, there is no danger of their exerting it, to ruinous and oppressive purposes, because they must suffer the ill consequences of their own tyranny. But tho sovereignty be considered as a quality of the supreme legislature, yet there are certain general rules, and fundamental principles, by which they are to be restricted, and directed in their proceeding. The constitution must be held sacred and inviolable, and can never in any measure be varied or amended without the consent of the people at large, by whom it was originally made, and from whose approbation and consent it derives its authority. In enacting laws they are bound to consult the highest political happiness of the people; they may never restrain the natural liberty of any person, unless it be found necessary for that purpose, and they may never oppugn the immutable principles of morality. Under these restrictions, they have the supreme sovereign power, of making such laws as they judge proper, and the people are under the strongest obligation to yeild the most explicit obedience.

2. Of the jurisdiction of the assembly, in matters of a private nature. They have the power of authorising, and validating the doing of a variety of acts not binding in law, as the sale of estates by minors and married women, where it will be for their interest.

They pass special acts of bankruptcy in favour of those persons who have been reduced and rendered unable to pay their debts by unforeseen accidents, and unexpected misfortunes. It is impossible to point out the rules by which they are governed in such cases, for having sovereign power, and being a changeable body, they are directed only by their discretion, upon the circumstances of every particular application. It may generally be remarked, that the petitioner must shew that his losses have been sustained by unavoidable misfortunes, and not by his own imprudence and misconduct; that he has acted honestly and uprightly in his business, that he makes a full disclosure of his property; that by the granting him an act of insolvency, his property may be justly distributed among his creditors, and he be restored to the rights of a citizen, and enabled to prosecute some honorable business for his support; that

denying him ſuch a favour, will defeat an equal diſtribution of his eſtate, and involve him in a calamity, from which his creditors can derive no benefit, and prevent him forever from being uſeful to himſelf, or the community. But whenever congreſs ſhall paſs general laws of bankruptcy, purſuant to the power veſted in them by the conſtitution, this power will ceaſe.

The general aſſembly exerciſes the power of granting bills of divorce, in caſes beyond the juriſdiction of the ſuperior court, in which they judge it reaſonable. No preciſe rule can here be pointed out, but it is a matter of diſcretion. From the inſtances which have taken place, it may be infered, that preſumptive proof of adultery, and direct proof of cruelty, abuſe and enmity, which render the ſituation of the ſuffering party dangerous, or miſerable, and defeat the deſign of the matrimonial connexion, will induce the legiſlature to grant a divorce, and make ſuch diſpoſition of the eſtate of the huſband, where he is the offending party, as is reaſonable for the ſupport of the wife.

The general aſſembly have reſerved to themſelves original juriſdiction, in all ſuits for relief in equity, where the value of the matter, or thing in demand, exceeds the ſum of ſixteen hundred pounds. At firſt the aſſembly reſerved all the power of a court of equity in their hands; but experience teaching the inconvenience of the practice, induced them to delegate all their power in all matters under ſixteen hundred pounds, to the ſuperior and county courts. Why the whole power was not delegated, and why the ſuperior court is not as able to decide all controverſies in equity, exceeding ſixteen hundred pounds, as they are in law, no reaſon can be given.

A queſtion of great nicety and difficulty ariſes reſpecting the conſtitutional juriſdiction of the general aſſembly, in controverſies of a private and adverſary nature. It ought to be deemed an inviolable maxim, that when proper courts of law are inſtituted, the legiſlature are diveſted of all judicial authority. It is true, that in England in early times, the parliament aſſumed juriſdiction in private controverſies, and a ſimilar practice has been adopted by the aſſembly in this ſtate. It has ſometimes been contended that

g Statutes, &c.

that the aſſembly by virtue of their ſupreme authority, may ſuperintend and overlook all inferior juriſdictions, and may proceed upon the principles of abſtract right and perfect juſtice, to grant relief to the people in all inſtances in which they have ſuſtained wrong in any poſſible manner whatever. This would be a power of a moſt excellent nature, to be lodged ſomewhere, if we could find a perfect perſon to execiſe it. But it is apparent, that the admiſſion of this would deſtroy all ideas of a uniform, permanent ſyſtem of law, erect one great arbitration over the ſtate, and throw every thing afloat on the wide ocean of whim and caprice.

* It is enacted by ſtatute, that no petition ſhall be prefered to the aſſembly, but in caſes where no other court is by law competent to grant relief. The true meaning and conſtruction of this ſtatute, is not that petitions may be prefered to the aſſembly in caſes where the courts refuſe relief, becauſe that by the rules of the law relief ought not to be granted; but that where a new caſe happens, that has never been contemplated by a court of law, or equity, ſo as to adopt a rule reſpecting denying, or granting relief, then ſuch omitted caſe, may be the ground of an application to the legiſlature. For it can never be ſaid, that a court is incompetent to grant relief in a certain caſe, when by the rules that are adopted by the court, relief ought not to be granted. A contrary conſtruction will be productive of miſchievous conſequences.—If an equitable claim, that has been diſallowed by a court of law or equity, or if an apparently equitable claim, that muſt be diſmiſſed by court of equity as well as of law, be a proper foundation for an application to the general aſſembly, their juriſdiction muſt be extenſive, and they may review the determinations of all the courts they have conſtituted. How many inſtances can be found, where challenges in law and equity have been erroneouſly, as well as legally rejected, upon which a petition can be prefered to the aſſembly, with a ſtatement of facts which might induce a tribunal, that acted upon diſcretionary principles of doing juſtice, to believe that relief ought to be granted. If they can interfere in one inſtance, they can in all, and the conſequence will be, that every controverſy muſt ultimately be decided by the legiſlature. It therefore is the

* Statutes, 192.

only maxim, that can be adopted conſiſtent with the genuine principles of the conſtitution, that no legiſlature has a right to interfere in any private controverſies, between man and man, which are cognizable by the courts, tho ſuch courts have rejected a claim apparently juſt, becauſe by the rules that they had adopted, or the laws in being, no relief ought to be granted. For ſuch interference not only deſtroys the certainty, and uniformity of laws, but is of itſelf, an ex poſt facto law, which no legiſlature can conſtitutionally paſs. Let the legiſlature make good laws, and leave it to the courts to expound them.

It muſt however be acknowledged, that the legiſlature have paid no regard to theſe principles, tho fairly deducible from their own law. I have known repeated inſtances where they have ſuſtained applications that manifeſtly and expreſsly were excluded from relief by the general laws. I have known petitions preferred to obtain relief in caſes againſt the deciſion of courts and juries, and the aſſembly have gone over the head of ſuch deciſions and granted relief.

I have known them grant relief, when the claim was barred by the ſtatute of limitation; tho it is one of the cleareſt principles in a court of equity, that no relief can be had againſt the operation of ſuch a ſtatute: for all ſtatutes of limitation, ſuppoſe that there is a poſſibility, that juſt claims may be barred, but the neceſſity of preventing diſputes of a long ſtanding will juſtify the meaſure.

When we conſider the legiſlature as a legal tribunal, exerciſing this extraordinary branch of juriſdiction, it exhibits our juriſprudence in a ſingular light. We have courts of law and equity, inſtituted for the purpoſe of deciding all queſtions of right, between man and man, by poſitive rule, as well as by equitable principles. But if a man ſhould fail to obtain redreſs in the ordinary courts of judicature, he may then apply to the extraordinary judicature, the general aſſembly, who are not governed by the principles of law, and equity, but render juſtice according to their ſovereign will, and pleaſure. It is true, that at the firſt ſettlement of the country, the general aſſembly was conſidered as a judicial tribunal, and appeals were admitted in all caſes, from juſtices of the peace, to county

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courts, then to ſuperior courts, and then to the general aſſembly. This muſt have been owing to the inaccurate ideas of our anceſtors, with reſpect to the proper power to be lodged in the different branches of the government. Hence we find that as their knowledge increaſed by experience, they were conſtantly leſſening their judicial juriſdiction, till finally they diſburdened themſelves of the whole, excepting in caſes of equity, where the ſum in diſpute exceeded ſixteen hundred pounds. As ſoon as the legiſlature have eſtabliſhed proper tribunals, for the deciſions of all controverſies, according to law and equity, they can have no right to interfere in the deciſion of ſuch controverſies: for the human mind cannot imagine a greater abſurdity than to eſtabliſh courts of law and equity to determine all queſtions of right between man and man, and then to admit the legiſlature to exerciſe a ſovereign authority, in relieving againſt their determinations. The conſtitutional power of the legiſlature is to make laws, of a court of judicature to expound them; but where ſhall we ſtop if the legiſlature, in private diſputes, may make a law, which ſhall relieve againſt the operation of a prior law of their own making, as in the caſes of ſtatutes of limitation. We ſhall have one grade of tribunals to act by eſtabliſhed, uniform, and general rules, and another to reverſe their decrees without regard to rules.

If the legiſlature were to purſue the principles which reſult from their determinations, they might grant relief againſt all deciſions at law, and in equity, and might ſet aſide all ſtatutes of limitations; but they never conſider themſelves to be bound by prior deciſions. They furniſh a remedy in one caſe, and deny it another, ſtanding on a ſimilar baſis—Of courſe they never have any general rules to govern their proceedings. Let a caſe be ever ſo equitable, no man has any grounds on which he can calculate with certainty reſpecting relief. If the right of the caſe be doubtful, yet ſo uncertain is the rule of deciſion, that there is a poſſibility of ſucceſs. Indeed from the nature of the tribunal, it is utterly impracticable to ſyſtematize the principles of proceeding: they are therefore obliged to adopt that abominable doctrine, that every caſe is to ſtand on its own bottom, and be determined according to its particular circumſtances, and they can take no other guide than ſovereign whim

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and ſupreme diſcretion. The conſequence of this has been the accumulation of buſineſs of a private and adverſary nature, which is extremely burdenſome to the legiſlature, and inconvenient to the parties. A conſiderable portion of the time of each ſeſſion, is taken up in hearing private diſputes.

Not only do the legiſlature diſregard prior deciſions, but where an application has been rejected at one ſeſſion, it is no bar to another application for the ſame thing: and by repeated applications, the ſuitors ſometimes by changes of the members of the legiſlature, a very changeable tribunal, will gain their cauſes. This is in effect, offering a premium to litigation.

No tribunal can be leſs adapted to the deciſion of private diſputes, than the legiſlature. The houſe of repreſentatives conſiſts of nearly one hundred and eighty members. It is impoſſible for them in the ordinary courſe of hearing, to inveſtigate the truth of a long intricate ſtory, or to comprehend all the principles on which a deciſion ought to be founded. In ſuch a numerous body we can not expect that coolneſs and candour in their deliberations, which ought to mark the conduct of a judicial tribunal. Generally, I do not think that one member in ten, is maſter of the caſes decided by the legiſlature. It is a ſerious reflection, that the rights of property ſhould be dependant on the vote of ſuch a tribunal. I am confident that it very rarely happens, when they interpoſe, that they accompliſh that juſtice, which they aim to purſue. It is ſtrange they can wiſh to exerciſe a power ſo manifeſtly unconſtitutional, and ſo highly inconvenient. I know of no other legiſlature which aſſumes ſuch an extraordinay juriſdiction; and I hope for the honor of the ſtate, this only reproach to our ſyſtem of juriſprudence, will very ſoon be wiped away.

[*] It is enacted by ſtatute, that no petition ſhall be prefered, unleſs the value of the debt, damage, or matter in diſpute, exceed ſeven pounds. In this place, two general rules that reſpect the members of the legiſlature, may be inſerted. [†] That no member ſhall diſcloſe any matter enjoined to be kept ſecret, or make known to any perſon, what any one member of the court ſpeaks, concerning

[*] Statutes, 192. [†] Ibid. 28.

ing any perſon or buſineſs, that may come in agitation in the court, under a penalty of ten pounds: [a] and that no member ſhall appear as an attorney, unleſs in his own caſe, or the town he repreſents, or in ſuch caſe, wherein the law will not allow him to ſit as judge, and if any member appear at the bar, in the character of an attorney, his ſeat is vacated for the time for which he was elected.

VI. Of the method of making ſtatutes, and proceeding in private matters. And, 1. Of making ſtatutes, and proceeding in public matters.

The ſeſſion of aſſembly is opened by an addreſs from the governor to both houſes, in which he ſuggeſts to their conſideration, the proper buſineſs to be done, and lays before them all public papers, letters, and communications.

A bill may originate in either houſe. In the houſe of repreſentatives, no member may bring in a bill, without firſt obtaining leave of the houſe. This muſt be done by motion for leave, when the member ſtates the ſubſtance of the propoſed bill. The granting leave ſometimes is objected to, and a debate enſues; but the uſual method is to grant leave on motion, without objection or debate.—The houſe ſometimes appoint committees to prepare and bring in bills on particular ſubjects, and ſometimes to take into conſideration any ſpecial matters, and report by bill or otherwiſe. In ſome caſes, committees are appointed by both houſes to join in conſideration of any matter, and make report. When the bill is brought in, it is read once and laid on the table, and cannot be read again on the ſame day, and propoſed by the ſpeaker for debate, without order of the houſe. On a ſecond reading of the bill, the ſpeaker propoſes it for debate. If it be lengthy, and contains ſundry paragraphs, it is uſual to conſider it by paragraphs. Any member may propoſe any amendment or addition. When the members have finiſhed the debate, and the queſtion is called for, the bill being read a third time, the ſpeaker puts it to vote. If the bill paſs, an entry is made by the clerk, and the bill without ceremony, or parade, is by the clerk tranſmitted by the hand of the officer who waits on the houſe, to the ſecretary, who by the ſheriff tranſmits it to

[a] Statutes, 448.

to the governor. When a bill paſſes the council, the ſecretary makes an entry and ſends it by the officer, to the ſpeaker of the houſe of repreſentatives. When a bill paſſes one houſe, and is tranſmitted to the other, it may be taken into conſideration. In the houſe of repreſentatives, they proceed, as tho the bill was brought in on motion. If the bill paſs without alteration, it is tranſmitted to the ſecretary, and becomes a public act, irrevocable without the conſent of both houſes; but if either houſe paſs it with alterations, or negative it, then it muſt be tranſmitted to the enacting houſe, who may appoint a committee of conference: the bill is returned to the other houſe, who appoint a committee. When the committee have confered, a report is made by the committee, of the reaſons given by the enacting houſe, to the negating houſe, when the queſtion of reconſideration and concurrence is tried: if it paſſes in the affirmative the bill becomes a public act, if in the negative it is dead, and can be revived only on motion for reconſideration. If a bill paſs, and during the ſeſſion, either houſe with any amendment, it muſt be propoſed by meſſage to the other, as the joint concurrence of both is neceſſary to the alteration: the propoſed amendment muſt be ſtated—if both houſes agree, it will be valid, but if either diſſent then the original act ſtands. When an act is paſſed, the ſecretary records it, and it is in force from the riſing of the aſſembly.

In the October ſeſſion of aſſembly, the houſe of repreſentatives appoint committees to receive the military returns, and make report, to receive the liſts from the ſeveral towns and make up the grand liſt, to receive the votes of the freemen and count them, jointly with a committee from the council, and report the perſons nominated for election in the enſuing May. In the May ſeſſion, committees are appointed to receive military returns, and the additions to the liſts, and report. The members for the ſeveral counties, nominate the judges of the county courts, juſtices of the quorum, and juſtices of the peace, for each county, and the judges of probate in the diſtricts in the ſeveral counties, and lay in bills for their appointment. The members that live in the limits of brigades nominate general and field officers—and lay in bills. But the concurrence of both houſes is neceſſary to the appointments.

Theſe

Theſe are the outlines of the general mode of proceeding founded on cuſtom, or expreſs rules which have been adopted—but with reſpect to which no ſtatutes have been made. Theſe rules contain ſundry other minute directions, which I need not here enumerate: but I cannot fail to remark upon the conciſeneſs and ſimplicity of the mode of tranſacting buſineſs in the legiſlature. There is no public formality in communicating the acts of one houſe to the other. The acts atteſted by the ſecretary or clerk, and tranſmitted by an officer, is all that is required. The houſe of repreſentatives, never reſolve themſelves into a committee of the whole houſe, to conſider any ſubject. All bills, however important, are ſubjected only to one diſcuſſion, unleſs they are poſtponed, and a ſingle vote decides their fate. This mode is extremely well calculated for expedition, but it muſt be acknowledged, that it ſometimes precludes that fair chance for deliberation, enquiry, and diſcuſſion, which is had in other legiſlatures.

2. Of the method of proceeding in private matters. The mode of bringing private controverſies before the aſſembly, is by prefering a petition or memorial, ſtating the nature of the diſpute, and ſigned by the party; to which muſt be annexed a citation to the oppoſite party to appear, ſigned by proper authority, a duty of twelve ſhillings paid, which muſt be legally ſerved on the oppoſite party, by leaving a copy with him, at leaſt twelve days before the firſt Tueſday after the commencement of the ſeſſion of aſſembly; on which Tueſday, the party muſt be notified to appear. The petitioner muſt appear the next Wedneſday after the commencement of the ſeſſion, or his petition will abate. All memorials, where no perſon need be cited, muſt be lodged in the ſecretary's office, on or before the eighth day of the ſeſſion, or they ſhall not be heard. But the legiſlature may diſpenſe with this rule, and admit on motion.

The mode of trial of adverſary matters is as follows.——The reſpondent may plead in abatement to the petition, on account of any defect in the manner of bringing it forward, or that the matters contained in it, do not warrant the interpoſition of the legiſlature, in the nature of a general demurrer. If there be no plea in abatement, it is uſual to go to trial on the merits without

pleading. The governor calls both houſes together, when the proceedings are public. Witneſſes are introduced, and examined, and the counſel argue the cauſes. When the public hearing is finiſhed the houſes ſeparate and take the caſes into conſideration, and debate the matter if they pleaſe. If either houſe refuſe to abate a petition, on a plea in abatement, it goes of courſe to a hearing. Both houſes muſt concur in any grant, and in caſe of differing votes, they confer by committees as in public bills. If a grant be made, a bill in form is drawn purſuant to the grant, and paſſed into a reſolve, which is in the nature of a decree. x If on trial, it appear that either party has given the other unjuſt trouble, the party wronged, ſhall recover his juſt coſt, and damages.

If a petition be called, and the party cited does not appear, it may be heard before the houſes ſeparately. In ſuch caſes, and in petitions where there is no oppoſite party, the method of proceeding in the houſe of repreſentatives is, to hand the petition to the ſpeaker, and when it is read, ſome member having been previouſly thereto requeſted, informs the houſe that the petitioner wiſhes to be admitted on the floor, to be heard in ſupport of his petition, which is granted of courſe. The petitioner may then come forward with counſel if he pleaſes—and may enforce his petition by proof and arguments, as he thinks proper. When the hearing is finiſhed, the houſe proceeds to a conſideration and determination. In like manner, the petitioner may be heard before the council, and if the houſes differ in their votes, committees of conference are appointed, as in caſe of public bills, and if both houſes concur in a grant, a bill in form paſſes into a reſolve, and eſtabliſhes the grant. Sometimes when the facts are many and intricate, they appoint a committee of the members to hear, examine and report the facts, with their opinion thereon, and ſometimes of perſons who are not members.

VII. This ſubject will be cloſed by conſidering the adjournment and diſſolution of the aſſembly. Either houſe, may adjourn from day to day, and both houſes may adjourn to any proper time, within the limits of their appointment.— y but no general court can be diſſolved or prorogued without the conſent of the major part.

x Statutes, 191. y Statutes, 125.

part. The members are conſidered, as holding their offices till new appointments are made. An actual diſſolution of the council happens annually; of the houſe of repreſentatives, ſemi-annually, which is the only mode, by which a diſſolution can be effected.—When they have finiſhed the buſineſs before them, both houſes convene, and the governor after an addreſs to them, diſmiſſes them from any further attendance, which is called the riſing of the aſſembly.

A ſtranger in looking over our conſtitution, and obſerving the frequency of the election of both branches of the legiſlature, the veſting in it the appointment of all officers, uſually appointed by the executive, the giving ſo little power to the governor, would think that it muſt render the government extremely feeble and inefficient. But when he came to obſerve it in practice, he would find it to be well calculated and balanced to anſwer the purpoſes of its inſtitution.

A ſentiment has for a long time been impreſſed on the minds of the people, that it is beſt for the community, to continue in office all perſons who have once been honoured by their ſuffrages, in caſe they continue to merit their confidence. In conſequence of this, there are but few inſtances where perſons have been left out of any of the higher offices, till age and infirmity rendered it neceſſary. This noble ſentiment ſeems to be interwoven in the character of the people, and has a powerful tendency to render public offices ſecure and permanent. In the election of the council, the mode eſtabliſhed, is wiſely calculated to prevent any change, by the influence of any ſudden whim or caprice: while the people have full power every year to diſmiſs a perſon whoſe miſconduct had alienated their regard and confidence. The privilege of the freemen, to give their ſuffrages for twenty perſons to ſtand in nomination for election, and the law that the twenty who have the higheſt number of votes, ſhall ſtand in nomination, gives a decided advantage to thoſe, who are actually in office, becauſe they muſt be beſt known, and will be moſt generally voted for. The practice of placing thoſe who are aſſiſtants, the firſt on the liſt, according to ſeniority of office, tho others may have a greater number of votes

is a great ſecurity of their re-election; becauſe the law requires that thoſe who ſtand firſt in the nomination, ſhould be firſt voted for. In ſuch caſes we find that there is a wonderful mechaniſm in voting. The freemen in general will not have any perſonal attachment to the perſons nominated, and they will generally vote for thoſe who are firſt called. There may be ſome places where local feelings may operate, but this will rarely be ſufficient to counteract the general indifference. Numbers towards the cloſe of voting will uſually retire. Theſe circumſtances will forever cooperate, to give ſufficient ſecurity and permanency, to the ſeats of the aſſiſtants, and to counteract the intrigues of party, and the fluctuation of popular inſtability. But at the ſame time, the aſſiſtants can never obtain ſuch certainty of continuing in office, as to tempt them to extend their power, and encroach on the rights of the people. They muſt conſult the public good, to ſecure the ſuffrages of the freemen, for whenever they become generally unpopular, they will infallibly be diſmiſſed from office. This advantage then reſulting from the mode of election, has no effect but to render permanent the ſeats of thoſe who conduct well, by guarding them againſt the ſchemes of parties: but when the conduct of an aſſiſtant requires his diſmiſſion from office, the people have ample power to accompliſh it. This mode of election, therefore, may with propriety be conſidered, only as a check upon popular inſtability, and not any infringement upon freedom and fairneſs in election.

The mode of placing the names of the perſons in nomination cannot be called unfair or injurious as relative to the candidates. The perſon who has the higheſt number of votes, has no greater right to be elected an aſſiſtant or to have his name ſo placed as to give him a better chance to be elected than he who has the ſmalleſt number. If none have a preferable claim, and if there will be a certain mechaniſm in voting, let whatever mode be adopted, it is clearly good policy to direct its operation in favour of permanency and ſtability in government, eſpecially when it is ſo popular as in Connecticut.

The election of the houſe of repreſentatives twice each year, produces no inconvenience. The ſmallneſs of the diſtricts from

which

which the people aſſemble, prevent its being burdenſome, the frequency of election prevents intrigues, and the diſpoſition to re-elect men of merit, prevents any general change of the members.

But the veſting in the people, and in the legiſlature, the appointment of the executive and judiciary, ſeems at firſt view, to be leaving ſo little power for the governor, who is called the chief magiſtrate, that the executive arm cannot be ſufficiently ſtrong to carry the laws into effect. If this ſtate conſtituted a diſtinct government, unconnected with the United States, it is beyond a doubt, that the power of the executive muſt be encreaſed to give ſtability, and energy to the government. But while it conſtitutes a part of the union, and directs only the internal concerns of the ſtate, the power of the ſupreme executive, will be found adequate to every purpoſe, while the limited extent of it produces the beſt effects.

The governor has the power of making ſo few appointments, that he cannot by force of his office, eſtabliſh and arrange ſuch a connexion of friends, and train of dependents, as to ſecure his re-election by his official influence. He muſt depend upon his capacity and patriotiſm, to retain his ſeat. He will not be able to command it. But in ſome ſtates, ſo great is the patronage of the governor, that by his appointments to office, he may form ſo powerful a combination in his favour, as to ſecure his election, and give him an influence prejudicial to the freedom and independence of the people. A governor ought not to have the means of accumulating ſuch power in his own hands. It will be a conſtant temptation to keep ſuch an object in view in all his appointments, and the public good will invariably be ſacrificed to his ambition. He will appoint thoſe only, who combine their exertions, to promote his intereſt, and if there be a number of well-meaning, honeſt men, who wiſh to get rid of ſuch oppreſſion, or who conceive him to be unfit for the office, he will be ſure to keep them out of office, to prevent them from counteracting his ſchemes. The appointment by the legiſlature as in this ſtate, precludes all theſe inconveniences, and tho it may be conſidered that an annual appointment, muſt render ſuch offices too inſecure, yet the general principle having been adopted, that when perſons are once appointed to an office,

they

they are entitled to be re-appointed, unleſs they have become diſqualified by infirmity or miſconduct, they may conſider themſelves as appointed during good behaviour: but the appointment being annual a perſon may at any time be left out, when he becomes infirm; or may be diſmiſſed for miſconduct, without the formality, and expence of an impeachment.

But there is another conſideration which evidences an important advantage in our conſtitution: as the general government regulates all national concerns, and conducts the intercourſe with foreign nations, there is no neceſſity of a very ſtrong executive in the ſtates. If the ſtate executive be veſted with great patronage and influence by force of appointments, the conſequence is, that as the head of the ſtate government, the governor draws to himſelf, ſo much importance, that he will view the government of the union, with a jealous eye. He may be apprehenſive, that the ſplendor of his office, may be clouded and the ſtrength of his arm leſſened by it. This will be a perpetual temptation to him to counteract the meaſures of the general government, in ſupport of his perſonal dignity, and the extenſive influence, he may acquire by his power of appointments, may enable him to make a very ſerious and formidable oppoſition. But the executive of this ſtate is admirably well calculated for a government, that is ſubordinate in certain reſpects to a general government. Here is no perſon diſtinguiſhed by ſuch power and influence, that he will be jealous of the union; but the firſt magiſtrate, and every member of the ſtate government, will conſider their importance, and reſpectability, augmented by their connexion with the general government. They can have no perſonal motives to attempt to embarraſs the meaſures of it; but if the governor ſhould be actuated by ſuch a jealouſy, his power will be inſufficient to defeat its meaſures. In all the ſtates it muſt be important, to have ſuch a general diſtribution of power, as will be beſt calculated to carry into execution the laws of the ſtate, as well as of the union, without admitting a combination of power to counteract them. But in the general government, the ſupreme executive muſt be veſted with powers co-extenſive with his duty. The preſervation of the peace of the union, and the protection againſt foreign invaſion. Here we may with propriety require ſtrength in the executive.

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The foregoing theory, perhaps, may be conſidered as confirmed by the fact, that in no ſtate in the union, has the adminiſtration of the general government met with more decided approbation and firm ſupport, than in Connecticut.

Chapter Third.

OF THE EXECUTIVE POWER.

THE executive is divided among ſeveral officers, which will be conſidered under two heads, the ſupreme, and the ſubordinate.

I. The ſupreme executive power is confined to narrow limits by the nature of our conſtitution, and our union with the United States.

Tho the power of the governor is leſs in this ſtate, than in ſome others, as he does not conſtitute a diſtinct branch of the legiſlature and can make but few appointments to offices, yet it ſtill deſerves to be conſidered as a ſtation of great reſpectability and dignity. In his legiſlative character, he is the preſident of the council. In the executive department, he is the ſupreme executive. [z] He is the chief magiſtrate of the ſtate, with the ſtile of his excellency. [a] He is commander in chief of the milita, with the power of appointing the adjutant general, two aids du camp, and of diſmiſſing commiſſioned officers. He ſigns the commiſſions of all judges, juſtices of the peace, and military officers. [b] He has the power of juſtice of the peace throughout the ſtate. He is the channel of correſpondence with neighbouring ſtates, and with the government of the United States. All communications of public papers, and acts of congreſs are tranſmitted to him, from the heads of the executive departments, and all orders from the ſupreme executive of the union, are directed to him. He has the power of iſſuing proclamations upon all proper occaſions. [c] He may reprieve a condemned malefactor, till the next general court.

The governor and council have ſome ſhare of executive power.— [d] They appoint the ſheriffs in the ſeveral counties. [e] They are inveſted with the power of laying embargos, and for that purpoſe, the

[z] Statutes, 27. [a] Ibid. 434. [b] Ibid. 106. [c] Ibid. 28. [d] Ibid. 213. [e] Ibid 46.

the governor with advice of council may iſſue a proclamation prohibiting the tranſportation out of the ſtate by land or water, any article or thing, as they ſhall think neceſſary or expedient for a certain time, to be limited in the proclamation. *f* They may grant briefs, praying the charitable contribution of the people, to ſuch perſons as they judge the proper objects of charity, and without their approbation, briefs are illegal. *g* They are enabled to grant commiſſions of ſewers, upon application made to them, by the major part of the proprietors of ſuch lands as may be benefited thereby. They exerciſe the authority, every ſpring of appointing a day of public faſting and prayer, and prohiting ſervile labour on ſuch day. Their authority for this, is derived from immemorial uſage and conſent.

A day of public thankſgiving, is appointed by the legiſlature in the fall ſeſſion, and the governor in both caſes, iſſues his proclamation, requiring them to be religiouſly obſerved.

The lieutenant-governor, has the ſtile of, his honour, and has the power of juſtice of the peace, through the ſtate. Each aſſiſtant has the ſame power.

II. Of the ſubordinate executive officers. And, 1. Of the Secretary. This officer is elected annually by the people, in the ſame manner as the governor. In the ſeſſion of aſſembly, he performs the duty of clerk for the council, by making entries on all bills and petitions, of their votes. His office is created and his duty pointed out by ſtatute. *h* That the ſecretary ſhall have the keeping and cuſtody of the records, and other public papers, that contain the acts, orders, grants, and doings of the general aſſembly, and that relate to ſuch matters and affairs, as are of general concern, and are to be recorded and kept in his office. He ſhall record all acts, grants, orders, and reſolves made by the aſſembly, and give true copies when reaſonably required. He ſhall within twenty days after the end of every ſeſſion of aſſembly, publiſh in writing, under the ſeal of the ſtate, the acts, laws and public reſolves, and ſend them to the printer of the State of Connecticut, that they may be printed. He is keeper of the ſeal of the ſtate, and is obliged to affix it to ſuch laws, acts, orders, commiſſions, inſtruments, and

f Statutes: 18. *g* Ibid. 219. *h* Ibid. 218. *i* Statutes.

and certificates, as he ſhall by law be ordered to do, or ſhall be deſired by particular perſons, who have occaſion therefor.

2. Of the Treaſurer. [i] He is elected annually by the people, in the ſame manner as the ſecretary. And has the ſuperintendance and care of the revenues of the ſtate. The public revenue conſiſts in the annual grant of taxes by the aſſembly, the duties upon writs, fines, and forfeitures for public offences, inflicted by the ſuperior and county courts. The monies are all to be paid into the hands of the treaſurer, who depoſits the ſame in the treaſury, which is under his care and management. He is obliged to keep a regular account of the public taxes, and monies which he receives—and his accounts are annually audited by perſons appointed for that purpoſe by the aſſembly. [k] He muſt become bound with ſurety, in five thouſand pounds lawful money, to the ſtate, for the faithful diſcharge of the duties of his office, and to render his account when required. Which bond is to be taken by the governor and council, and to be regiſtered and kept by their clerk. The ſecretary, and clerk of the ſuperior court are bound annually to give him an account of all the fines and forfeitures belonging to the ſtate treaſury, and he may iſſue his warrant to the ſheriff for their collection.

[l] It is provided by ſtatute, that all demands againſt the ſtate, not firſt liquidated and allowed by the general aſſembly, or by the governor and council, or houſe of repreſentatives, or ſupreme court of errors, or by the ſuperior court, or by a court of common pleas, by virtue of ſome expreſs law, ſhall be liquidated and ſettled by the comptroller, who ſhall give orders on the treaſurer to authoriſe him to pay the ſame.

When the aſſembly grant a tax, it is the duty of the treaſurer to iſſue a warrant within three months before the tax is payable to the conſtables, who are collectors in the ſeveral towns, commanding them to levy and collect the ſame according to law.—Upon their failure, within four months after the tax, has become due, he is impowered to iſſue a diſtreſs to the ſheriff of the county where the collector dwells, to collect the ſame of ſuch negligent collectors.

i Statutes. k Statutes, 323. l Statutes, 375.

The treaſurer at the requeſt of the ſelectmen of any town, may iſſue an execution in their name, directed to the ſheriff of the county or his deputy, againſt a collector, at any time after the tax becomes due, that the money may be collected for the indemnity of the town, who are to pay the ſame to the treaſurer, within four months after the taxes become payable, and on failure, execution is to iſſue againſt the perſons and eſtates of the ſelectmen, and the inhabitants of the town.

Where no application is made by the ſelectmen to the treaſurer, for an execution againſt the collector, and the execution iſſued againſt him is returned non eſt, or he becomes inſolvent, then execution may go againſt the town. Theſe proceedings are pointed out by ſtatute, and the nature of theſe elementary enquiries will not permit a further diſcuſſion of this ſubject.

3. The comptroller, is appointed annually by the general aſſembly. He ſuperintends and liquidates the public accounts. His office is created and his duty pointed out by ſtatute, but as it is continued only from year to year, and is not conſidered as a permanent office, it will be unneceſſary to conſider it more minutely.

4. The ſheriff is an officer of great importance in the executive department of government. The office is derived to us from England: but the power of it depends on ſtatutes, which have conſiderably varied it from what is in England.

m There muſt be a ſheriff in every county, he is appointed by the governor and council—he muſt become bound before them, with two ſureties, who are freeholders, in a recognizance of one thouſand pounds lawful money, to the treaſurer, for the faithful adminiſtration of his office. He receives a warrant from the governor, or in his abſence from the lieutenant-governor, impowering him to execute his office. Any perſon may be appointed to this office, and no perſon is ſubject to any penalty, for refuſing to accept an appointment. The office is held during good behaviour. The governor and council may diſplace him upon proper reaſons, and he may reſign his office at pleaſure.

The

m Statutes, 223.

The ſheriff is conſidered as the principal officer in the county, and has great and extenſive authority. It is his duty and in his power to preſerve the peace of the county, and to ſuppreſs all tumults, riots, routs, and unlawful aſſemblies, by force and ſtrong hand. He may officially and without warrant, apprehend all perſons whom he ſhall find in the diſturbance of the peace, and them carry before proper authority. He may command all proper perſons within his county, to aid and aſſiſt him in the execution of his office. This is the ſame power that they have in England, and is called raiſing the poſſe commitatus, or power of the county.

In caſe of great oppoſition, or where he has reaſon to ſuſpect it, he may with the advice of one aſſiſtant or juſtice of the peace, or more if they be preſent, raiſe the militia in the county, or ſo many of them as they ſhall judge needful, who are bound to yield obedience. The ſheriff being inveſted with ſufficient power to execute his office, and it being abſolutely neceſſary, for the exiſtence of government, that he ſhould execute his office, he ſhall not return that he cannot do execution. The ſheriff is bound to read the riot act, in all caſes of riots.

He is authoriſed to ſerve and execute all lawful writs, to him directed, by lawful authority, and the power of water bailiff, is annexed to his office. He is bound to receive all lawful writs, when they are tendered to him within his county, and make return according to law, and the direction therein given: he muſt give a proper receipt for all writs, if demanded, and a receipt be preſented without fee or reward, and on refuſal, other perſons may ſet their names to ſuch receipt, as witneſs to the delivery. On neglect to execute or making falſe return, complaint may be made to the court or juſtice, to which ſuch writ was returnable, who may enquire into the facts, ſet a ſuitable fine on the ſheriff, and award juſt damages to the party injured. This ſtatute gives all courts original and final juriſdiction, on all receipts for executions, granted on judgments, by them rendered.

The ſheriff is by his office, chief keeper of the goal in the county, and has the charge and cuſtody thereof, and may appoint ſuch

keepers under him as he ſhall think proper, and is reſponſible for any damages that any perſon may ſuſtain, by the eſcape of any priſoner from goal, by the fault or connivance of ſuch keepers, or any other perſon that has the charge of ſaid goal under the ſheriff, and alſo for other faults and negligences of ſuch under-keepers, in any matters reſpecting ſaid truſt.

The ſheriffs have the power of conſtituting and appointing, a certain number of deputies, to act under them, who have the ſame authority as the ſheriff, and who, as well as the ſheriff muſt take the oath by law preſcribed, before they are qualified to execute the office.

The ſheriff has the liberty of deputing ſome meet perſon on ſpecial occaſions, to ſerve and execute any particular proceſs, which deputation, muſt be on the back of the writ, and the perſon deputed after ſerving it, muſt make oath before proper authority that he ſerved the ſame according to his indorſement, and that he did not fill, nor direct any perſon to fill the ſame. The only inſtances where it is uſual for ſheriffs to make ſuch ſpecial deputies, are where no legal officer can conveniently be had, or the perſon againſt whom the writ is, ſecretes himſelf, and keeps himſelf out of the way of known officers. In ſuch caſes, he deputes ſome perſon for that ſpecial purpoſe, ſo that there be no failure of juſtice. The ſheriff or his deputy, may not draw, or fill up any writ, proceſs, or declaration, nor appear as attornies.

It is the duty of the ſheriff to attend on all the ſtated courts within the county, to preſerve good order in the court, and to execute their judgments. In all matters of a criminal nature, it is his duty to carry the judgments of the court into execution, by inflicting ſuch puniſhment as they order.

5. Juſtices of the peace, may be conſidered as having ſome ſhare of executive authority. It is their duty to conſerve the peace of the county. When riots happen, they have power to read the riot act, and command the rioters to diſperſe. In caſe of diſobedience, they have right to apprehend the offenders, and command any perſon to aſſiſt. The ſheriff muſt take their advice in raiſing

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the militia to quell riots. They, with the ſelectmen, conſtables, and grandjurors, nominate tavern-keepers. But their authority is chiefly of a judicial nature.

6. Goal keepers are appointed by the ſheriff, for the immediate keeping the goal, and ſecuring the priſoners. There are many other executive officers in the leſſer diviſions of the ſtate, ſuch as town and ſociety officers—theſe will be conſidered, when we come to treat of towns, and ſocieties, which are reſerved for a ſpecial conſideration, in the courſe of theſe enquiries.

Chapter Fourth.

OF THE JUDICATIVE POWER.

THE juriſdiction of courts of law is preciſely defined, and limited by ſtatute. We are perplexed by no diſputes on this ſubject, and have occaſion only to exhibit the ſeveral courts, from the higheſt to the loweſt, by a conciſe abridgment of the ſtatutes.

I. The Supreme Court of Errors, conſiſts of the governor, lieutenant-governor, and council; in which the governor preſides, and in his abſence the lieutenant-governor, or if he be abſent, the ſenior aſſiſtant preſent. Eight of the council conſtitute a quorum. This is the higheſt court of law in the ſtate, and is the dernier reſort in all matters of law and equity, brought by way of writ of error, or complaint from the judgment, or decree of the ſuperior court, wherein the rules of law, or principles of equity, appear from the files, records, and exhibits of ſaid court, to have been miſtakenly adjudged, and determined. This court is holden alternately at Hartford, and at New-Haven, the firſt Tueſday in June. The ſecretary is their clerk. It is the duty of this court, to commit the reaſons of their judgments to writing, which are to be ſigned by one of the council and lodged in the office of the clerk of the ſuperior court. This court was inſtituted in 1784, previouſly to which time, the general aſſembly was the laſt reſort.

II. The Superior Court conſiſts of five judges, appointed annually by the general aſſembly. This annual appointment of the judges of the ſuperior court, is the moſt exceptionable practice adopted in the ſtate. Judges have no power to frame laws—they

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can only expound them. They can have no temptation to extend or misconstrue the law, to the oppression of the people, because they can derive no benefit from such misconduct. The responsibility of the legislature to the people, is the security that good laws shall be made; but the judiciary are placed on a different basis. The security that they shall expound the laws justly, is their independence. Secure in their places, they can have no bias to deviate from the principles of justice, and they will equally resist the insolence of of power, or the caprice of the people. They will equally regard the rich, and the poor. But, if they must court the favour of the legislature, or the smiles of the people to preserve their offices, such will be their state of dependence, that they may insensibly be led in their decisions, to bend the principles of justice, to a calculation of securing the favor of the persons most influential in their appointments. In this state it is apparent that where a case comes before the superior court, for trial between an influential character, who is usually a member of the legislature, and a poor man without influence, the judges have not that independence of situation, which is necessary to enable them to form an impartial decision. There is danger of the operation of a bias on their minds, to which they ought not to be exposed by the nature of their appointments. As they can have no inducement to extend their power, let them be independent, and they have no inducement to swerve from justice.

They ought to be appointed during good behaviour, and removable on impeachment for corruption, and misbehaviour. This will be a sufficient guard against mal-administration: but to avoid inconveniencies of another nature, it would be proper to declare that they should not hold their offices after they arrive to a certain age, and that such a state of infirmity as precluded the performance of official duties, should vacate their seats.

[n] Their jurisdiction extends thro the state. They hold their courts in, and perform circuits thro every county. They possess a fourfould jurisdiction. They hold pleas of certain crimes. They have appellate jurisdiction in certain matters of a civil nature, from the courts of common pleas, and courts of probates. They have original jurisdiction in all matters of equity, where the sum exceeds one hundred pounds, and is less than sixteen hundred. They have jurisdiction

[n] Statutes, 29.

juriſdiction by writs of error from the judgments and decrees of the courts of ſubordinate rank. I ſhall treat of each branch of juriſdiction.

1. The criminal juriſdiction extends to all crimes, the puniſhment of which relate to life, limb or baniſhment, and to other high crimes, and miſdemeanors, and to adultery. They have by ſtatute juriſdiction of the crimes of blaſphemy, atheiſm, polytheiſm, and unitarianiſm. Of robbery, burglary, forgery, counterfeiting, and horſe-ſtealing. The expreſſion of high crimes and miſdemeanors, is of uncertain meaning, but the court have judged that under miſdemeanors, they have cognizance of all crimes where the common law puniſhments of fine, impriſonment, and pillory are inflicted. ſo that they denominate the offences, miſdemeanors at common law. [o] They have determined that they have cognizance of perjury.

2. The appellate juriſdiction is from the courts of common pleas, and courts of probate. Appeals lie from the courts of common pleas in all caſes, wherein the title of land is concerned, or the value of the debt, damage, or matter in diſpute, ſhall exceed the ſum of twenty pounds; excepting it be a bond, or note, vouched by two witneſſes. It has been adjudged that the ſum demanded in the writ, ſhall not be the rule of determining the juriſdiction; but that the court will look into the declaration and pleadings, and if from the facts ſtated it is apparent that according to the rules of aſcertaining damages, judgment cannot be rendered for a greater ſum than twenty pounds, the appeal cannot lie: but where it may be a diſcretionary matter with the jury to find greater, or leſs damages, the appeal muſt be ſuſtained. [p] In an action on book, the plaintiff averred that twenty pounds was due, and demanded twenty-five pounds, the court adjudged that no appeal would lie, becauſe the plaintiff could not recover more than the ſum he ſaid was due, which was but twenty pounds.

[q] In an action on note for fifty pounds, which appeared by the pleadings to be an arbitration note, and that the award was, that the defendant ſhould pay the plaintiff eighteen pounds only, judgment being rendered by the county court for that ſum, an appeal was taken, but abated by the ſuperior court, becauſe neither the original

[o] Kirb. Rep. 106. [p] Ibid. 35. [q] Gates vs. Jones. 8 C. 17, 2

original matter of controverſy, nor the award, amounted to twenty pounds, and the award was the only matter in diſpute. *r* In an action on book, demanding thirty pounds, the book produced was for leſs than twenty pounds, and the county court refuſed an appeal, but on writ of error, judgment was reverſed. The defendant in error offered to produce a certified copy from the clerk of the county court, where the book was lodged on file, that it was for leſs than twenty pounds, but the court ſaid they could not take notice of it, unleſs it was made parcel of the record.

ſ It has been adjudged that if a note or bond for money only, be witneſſed by two witneſſes, and at the time of trial, either of the witneſſes be dead, or become intereſted, ſo as to be excluded from teſtifying, that appeal will not lie; becauſe by the reaſon of the death, or intereſtedneſs of the witneſs, the note or bond cannot be vouched in court by two witneſſes.

t No appeals lie upon defaults, unleſs there was a hearing in damages, for otherwiſe the party is not ſuppoſed to be in court: but from every ſentence by which the party is aggrieved, if he be in court, appeal lies, as from a judgment rendered upon nihil dicit. *u* No appeal lies to an adjourned court.

It has been determined that no appeal lies from the court of common pleas, in a qui-tam proſecution, for any crime, let the matter in diſpute be of ever ſo great amount. *x* Formerly it was held that if the defendant was acquitted, the proſecutor ſhould not be allowed an appeal, becauſe no perſon ſhall be brought in jeopardy twice for the ſame crime: but if he was convicted, it was ſuppoſed that as the proſecution was of the nature of a civil action, he had a right to an appeal, if the ſum in diſpute exceeded twenty pounds. But in a late caſe of Gilbert againſt Stedman, the ſuperior court decided that the defendant on conviction, had no right of appeal, and this judgment was affirmed by the ſupreme court of errors.

Appeals in all caſes muſt be taken during the ſeſſion of the court from whence the appeal is taken, bond with ſurety given, and the duty of ſix ſhillings paid. The appeals muſt be entered before the ſecond opening of the court to which they are taken, unleſs the appellant

r Nelſon vs Hammond. S. C. 1793. *ſ* Ripley vs. Fitch, S. C. 1792. Kirb. Rep. 17. *u* Ibid. 366. *x* Ibid. 263.

appellant ſhall before the jury are diſmiſſed, pay to the appellee all his coſt in ſuch caſe ariſen to that time, which ſhall not be refunded, however the caſe may finally iſſue. But if the appellant do not enter the appeal, before the jury are diſmiſſed, the appellee may afterwards, and have the judgment of the county court affirmed, with additional coſt.

Appeals lie in all caſes from the determinations of courts of probate, unleſs it be a judgment accepting the report of commiſſioners, in allowing the claims of creditors, to an inſolvent eſtate, in which caſe it has been adjudged, that no appeal lies excepting the adminiſtrator be a creditor, and has an allowance made. In ſuch caſe it has been determined that an appeal lies, becauſe no perſon can conteſt his account at law, as he can the accounts of all other creditors. No appeal lies from a judgment on a report of auditors.

3. The ſuperior court has juriſdiction of all matters in equity, that exceed one hundred pounds, and are leſs than ſixteen hundred pounds, by petition originally preferred to them.

4. A moſt extenſive branch of juriſdiction ariſes from writs of error, from the courts of common pleas, and juſtices of the peace. From all judgments of the common pleas and juſtices of the peace, a writ of error will lie to this court, for any error in law or equity, apparent on the face of the record. Error may be brought in all criminal caſes, if it appear on the record. The time of bringing writs of error, is limited to three years.

This court has juriſdiction in all actions, that are neceſſary to carry their judgments into execution. Writs of ſcire facias on their judgments, and ſuits againſt officers who neglect to ſerve executions iſſued by them, may be brought directly to this court.

5. They have power to grant bills of divorce to married perſons purſuant to ſtatute: but this ſubject will be fully conſidered when we come to treat of huſband and wife.

6. [y] The ſuperior court and in vacation, the chief judge, or any two aſſiſtant judges, upon complaint made to them, that any other court do exceed their juriſdiction, or hold plea in any matter of which, they have not cognizance by which the perſon ſuggeſting is grieved, are impowered to grant a writ of prohibition, by them

y Statutes, 196.

ſubſcribed as well to the party proſecuting, as to the judge of the court, who exceeds his juriſdiction, prohibiting them from proceeding any further, and the court is impowered to proceed from time to time thereon, and render judgment, and award coſt according to law.

This writ is grounded upon a complaint from the defendant, ſtating the cauſe of action, and ſhewing that the inferior court exceed their juriſdiction, and are incompetent to try the action of which they claim cognizance. It is directed to the court as well as to the party proſecuting. If ſuch inferior court are ſatisfied when they receive the prohibition that they have no juriſdiction of the action, they ſtop their proceedings; if not, then they make a return of the action to the ſuperior court, which will be conſidered as a true return, on which the ſuperior court will decide the right of juriſdiction. If they are of opinion that the inferior court had not juriſdiction, the judgment is that the prohibition ſhall ſtand; if otherwiſe, they grant a writ of conſultation, which is a permiſſion to proceed in the proſecution and deciſion of the action.

7. The ſuperior court have decided that they have the common law juriſdiction to iſſue writs of mandamus to inferior courts and officers, to reſtrain them within proper bounds, and to oblige them to execute that juſtice, which their duty requirs. [a] They ordered a mandamus to iſſue to a town-clerk to record a deed. The party who moves the court for a mandamus, muſt ſtate the facts neceſſary to ſupport his motion, and make oath to their truth. Notice muſt be given to the adverſe party to ſhew cauſe why the motion ſhould not be granted. The firſt writ that iſſues, is a command to the officer or court to do the thing required, or return a ſufficient excuſe for not doing it. If the officer or court return an excuſe which is deemed to be ſufficient, the proceſs is at an end: but if it be adjudged inſufficient, then a peremptory mandamus iſſues, and if the officer to whom it is directed diſobeys, he is puniſhable for a contempt of their authority, and they will grant an attachment to take and impriſon him, till he obeys the order. Where a falſe return is made, the party injured, by the common law muſt have recourſe to his action, in which large damages are given, if the return is found to be falſe.

By

a Kirb Rep. Strong's caſe 315

By a ſtatute in Great-Britain, of the 9th of Anne, the complainant has a right to traverſe the return, which is tried by a jury, and if found againſt the officer, a ſpecial mandamus iſſues and damages are alſo given to the complainant. In this ſtate, in Strong's caſe, the court directed that the ſtatute of Anne, ſhould be the rule of proceeding in trying the ſufficiency of the return of the mandamus: but the conteſt was ſettled without a trial of the return.

8. The writ of habeas corpus, is a valuable privilege of the citizen, and is demandable of common right, for any perſon impriſoned under colour of authority, or without it, except the impriſonment be on execution, or on conviction of ſome crime. The ſuperior court grant this writ, which muſt be directed to the perſon who has the cuſtody of the complainant, with a command to bring him before the court, with the cauſe of his detention. This writ lies in favour of a wife confined by her huſband, or for a ſervant, or child confined by their parents or maſters. It will alſo lie in all caſes of impriſonment by legal proceſs, excepting on execution, and on conviction of crimes. When the perſon is brought forward before the court, with a return of the cauſe of his detention, the court will examine the matter, and if the detention be illegal, they may diſcharge him, or otherwiſe remand him to priſon. When the court is not ſitting application may be made to the chief judge, or in his abſence to one of the aſſiſtant judges. If a huſband ſhould confine his wife, after ſhe had been diſcharged by order of the court, he may be committed for the contempt.

The ſuperior court has ſtated terms in every county, and the chief judge, or in his abſence, any three of the other judges are empowered to call a ſpecial court, upon extraordinay occaſion.—When the court cannot conveniently be held at the time or place appointed, any three of the judges may adjourn it to any other time or place in the county, or continue the actions therein pending, to the next ſtated term, giving notice to the ſheriff under their hands, who ſhall proclaim and publiſh it in ſuch manner as they ſhall direct. If any judge be preſent at the place and time for opening of the court, he my open and adjourn it. If none are preſent, the ſheriff may adjourn till the next day, till the judges arrive.

When by abſence of any of the judges or legal exception to them, there ſhall not be a ſufficient number to hold the court, to try any caſe, the place may be ſupplied by any of the aſſiſtants. They have power to appoint and ſwear a clerk, and an aſſiſtant clerk, who ſhall have power to do every thing the office requires. The preſiding judge in caſe of an equi-vote, has a caſting voice.

The ſuperior court on complaint, have power to disfranchiſe a freeman, for walking ſcandalouſly, and committing ſcandalous offences, and on reformation, may reſtore him. This power is too general, and the deſcription of the crime too vague. It were better to deſignate the crimes, for which a freeman might be disfranchiſed, and not leave too much to the arbitrary opinion of a court.

It is the duty of the court in all matters of law, by them decided, on writ of error, demurrer, ſpecial verdict, or motion in arreſt of judgment, that each judge ſhall give his opinion ſeriatim, with the reaſons, and reduce the ſame to writing and ſubſcribe it, to be kept on file, that the caſe may be fully reported, and if removed by writ of error, be carried up with greater advantage, and thereby a foundation be laid for a more perfect and permanent ſyſtem of common law.

III. The courts of common pleas, or county courts are next in order. z Theſe have two ſtated terms, or ſeſſions annually, and may be adjourned as often as convenient, and called together as often as neceſſary. They conſiſt of one chief judge and four juſtices of the quorum, who are annually appointed by the general aſſembly. In abſence of the judge, the ſenior juſtice preſent preſides, and either three make a quorum: in caſe of abſence, or exception to the judge or juſtices, ſo that there be not a ſufficient number to proceed, their places may be ſupplied by any of the juſtices of the peace in the county. They appoint a clerk who is ſworn, and has power to grant attachments, ſummons, and replevins, to grant executions on judgments, and keep their records. In caſes of an equi-vote, the preſiding judge has a caſting voice.

The juriſdiction of this court, comprehends matters of a criminal, of a civil, and of an equitable nature.

1. The

z Statutes, 32.

1. The criminal jurisdiction by statute, extends to all crimes where the punishment does not relate to life, limb, or banishment, or adultery. These general terms would give them concurrent jurisdiction in sundry matters with the superior court; but perhaps the true distinction is, that the courts of common pleas have cognizance of all crimes beneath the jurisdiction of the superior court, excepting in cases where the statute gives concurrent jurisdiction, as for the crime of horse-stealing.

2. Civil actions principally originate before this court; they have therefore power to hear, examine, try, and determine, by a jury or otherwise, all civil causes, real or personal. All actions that exceed the jurisdiction of justices of the peace, are originally brought to this court. In all actions originally brought before justices of the peace, they have appellate jurisdiction, where the sum demanded exceeds forty shillings, and the bond or note is not vouched by two witnesses. They have final jurisdiction, unless by writ of error, in all cases wherein the value of the debt, damage or matter in dispute, does not exceed twenty pounds, and all actions on bonds, or notes for money only, vouched by two witnesses. No appeal lies in a suit against an officer for not serving an execution, or on a receipt for property on which execution was levied.

3. The equitable jurisdiction extends to all cases, wherein the matter in demand does not exceed one hundred pounds. A justice of the peace has no power in matters of equity, and the statute has fixed no sum, below which a court of equity cannot grant relief. No appeal lies in matters of equity, but writs of error may be brought to the superior court.

4. [a] The courts of common pleas in their respective counties, have the superintendance and guardianship, of all idiots, distracted, or impotent persons, that have any estate, and may order and dispose of it, in such manner as they shall judge best for their support, and put the persons to some proper labour, or service, at the discretion of the selectmen, or they may appoint conservators to the persons and estates, of such idiots, distracted, and impotent persons,

to

[a] Statutes, 98.

to provide for their ſupport, and be accountable to the court for the management of their truſt, when required: and on failure of perſonal eſtate to defray the expenſe of their ſupport, the court may order a ſale of the real eſtate.

5. The courts of common pleas in each county, and grandjurors there preſent, have power annually to grant and levy a tax as neceſſity may require, upon each town in the county, upon the liſts of ſuch year, to pay the debts and neceſſary charges of the county, which cannot be paid out of the fines and perquiſites allotted for that end.

6. [b] The courts of common pleas have the power of admitting attornies to practice. In this ſtate there are no grades in the profeſſion, all of the profeſſion, are called attornies, and when admitted by the court of common pleas in one county, may practice in every court in the ſtate. The ſtatute enacts, that the county courts in each county, may approve, nominate and appoint attornies, as there ſhall be occaſion, to plead at the bar; who ſhall take an oath before the court, and a record by the clerk ſhall be ſufficient evidence of the admiſſion. If they tranſgreſs the rules of pleading, eſtabliſhed by the court, they may be fined not exceeding five ſhillings. They are to be under the direction of the court, before whom they plead, and for juſt reaſon may be ſuſpended or diſplaced.

No perſon, except in his own caſe, is admitted to make any plea at the bar, in any court, unleſs qualified and admitted as an attorney according to law. This law has not been ſuppoſed to extend to juſtices of the peace, and before ſuch courts, perſons have been allowed to advocate cauſes, tho not qualified attornies. Where the title of land is not concerned, and the demand is not above ten pounds, one attorney on a ſide only is allowed to plead: and in all other caſes, two and no more. There is no attorney-general in the ſtate, but in every county, the court of common pleas, appoint an attorney for the ſtate, who is to proſecute all caſes in the county, in behalf of the ſtate, both in the ſuperior and county courts.

By the conſent and practice of the courts and attornies, the mode

[b] Statutes, &c.

mode of introduction to the bar has been, that the candidates for admiſſion, apply to the gentlemen of the bar, who either by themſelves, or a committee appointed for that purpoſe, examine them with reſpect to their qualifications, in point of knowledge of the law and fairneſs of moral character; and if they find them poſſeſſed of competent legal ſcience, and of fair moral characters, they recommend them to the court, who direct the clerk to adminiſter the oath by law provided. But otherwiſe, the bar will refuſe to recommend them.

A rule has been introduced by the agreement of the attornies in the ſeveral counties, that every candidate, whoſe education has been liberal, muſt ſerve as an apprentice, two years with ſome practiſing attorney, and every candidate, whoſe education has been common, muſt ſerve an apprenticeſhip of three years, with ſome practiſing attorney, before they are entitled to an examination, with reſpect to their qualifications, to be admitted to practice.

7. Courts of common pleas have power to lay out new highways, or alter old. The perſon making application, muſt give twelve days notice to the town, where the highway is, by cauſing a citation to be ſerved on one or more of the ſelectmen. If no objection is made, or the objection is adjudged inſufficient, the court may appoint a committee to enquire into the conveniency and neceſſity of the highway, and if found convenient and neceſſary, they may appoint a committee of three freeholders, to view and lay out, or alter the ſame, who muſt be ſworn, muſt give notice to the ſelectmen, and twenty days warning on the ſign-poſt; they muſt lay the highway in the moſt convenient place, eſtimate the damages done to each perſon, and make return to the court, which being approved and recorded, the highway is eſtabliſhed. The town where the highway is, muſt defray the expence, and on failure, a ſcire facias may be iſſued againſt the ſelectmen, and if no ſufficient cauſe is ſhewn, execution may be awarded, with additional coſt. If any individual is aggrieved by the doings of the committee, in laying out the highway, or eſtimating the damages, the court, before the acceptance of the report of the committee, may enquire into the matter complained of by a jury, if the party aggrieved deſire it and grant ſuch relief as the caſe may require: but if ſuch

application is groundleſs, the court may render judgment, and grant execution againſt the party applying, for the coſt. The application for a jury, is the only mode in which individuals, who are affected by the laying out a new, or altering an old highway, can ſeek for redreſs: till that time, the controverſy is between the petitioners, and the town: of courſe the court cannot have a diſcretionary power to grant a jury: the party aggreived may demand it of right, and the court cannot refuſe it. When a ſtatute ſays, that a court may do a thing, it does not give them a diſcretionary power; but the word *may*, is of the ſame legal import as *ſhall*.

A queſtion has ariſen with reſpect to the power of the court to alter highways. This diſtinction has been taken, that the court may alter, but cannot diſcontinue a highway. [c] In a certain caſe the county court laid out a new highway, and diſcontinued an old one, which paſſed by the houſe of a perſon, and who by the diſcontinuance, was ſhut from a public road. He brought his action againſt the man, who claimed to be the proprietor of the land, and who erected a fence, for a nuiſance, in obſtructing the highway, which was ſuſtained by the ſuperior court, on the principle, that the county court had no power to diſcontinue the old highway.

IV. Courts of probate, are conſtituted within certain diſtricts, are held by one judge appointed anually by the general aſſembly, with the power of appointing a clerk. [d] Their juriſdiction comprehends the probate of wills and teſtaments, the granting of adminiſtration, the appointing, and allowing guardians, and the acting in all matters of a teſtamentary and probate nature. In any difficult or diſputable caſe, the judge has power to call in to his aſſiſtance, any two or three of the juſtices of the quorum, in that county where the diſpute ariſes. The judge has the power of fixing the place of holding his courts. In all caſes, an appeal lies to the ſuperior court except from a decree, accepting the report of commiſſioners, and then if the adminiſtrator be a creditor to the eſtate, and has a debt allowed him. The perſon appealing muſt give ſufficient ſecurity to proſecute his appeal to effect. All perſons that are of full age, and preſent, or have legal notice to be preſent at the court of probate, that ſhall give the judgment, ſentence

[c] Allen vs. Lyon, S. C. 1795. [d] Statutes, 31.

fence, determination, denial, or order, muſt appeal to the next ſuperior court. All other perſons in this ſtate, or the ſtates of New-Hampſhire, Maſſachuſetts, Rhode-Iſland, New-York, and New-Jerſy, and of full age, at the time the court paſſes the decree or order, ſhall within eighteen months afterwards, or within eighteen months after coming of age, into this ſtate, enter their appeal from ſuch decree or order.

e On appeals from the court of probate, it is in the province of the ſuperior court, to fix the principles of the law, for the direction of the court of probate, but are not authoriſed to proceed through all the forms to a compleat ſettlement, as a prerogative court. The execution of the law, as aſcertained by the ſuperior, appertains to the courts of probate.

V. Juſtices of the peace, have jurisdiction both in matters of a criminal and civil nature. They are appointed annually by the general aſſembly, commiſſioned by the governor, and ſworn: as their principal duty conſiſts in preſerving the peace and good order of the county, there is a proper number aſſigned in each town, whoſe juriſdiction extends through the county.

1. Their juriſdiction in criminal caſes, extends to crimes where the penalty does not exceed forty ſhillings. And appeals lie to courts of common pleas for all crimes, but thoſe reſpecting keeping taverns without licence, and ſelling lottery tickets granted by another ſtate, drunkenneſs, prophane ſwearing and curſing, and ſabbath breaking, and of theſe three laſt crimes, the occular view of a juſtice or an aſſiſtant is ſufficient evidence to found a conviction upon, and they may iſſue their warrant, apprehend the offenders, bring them before them, and convict on their knowledge. f He may alſo by the common law officially bind thoſe to keep the peace who in his preſence make an affray, who threaten to beat, or kill another, quarrel, or go about with unuſual weapons, to the terror of the people and ſuch as are brought before him by the ſheriff or conſtable for a breach of the peace in their preſence. But in all other caſes preſentment muſt be made by an informing officer.

The power of juſtices of the peace, is not ſo expreſsly defined reſpecting

e Kirb. 224. f Hawk. P.C. 126.

reſpecting corporal puniſhments, as pecuniary penalty; they can however, inflict no corporal puniſhment, but whipping, ſetting in the ſtocks, and impriſonment. For the crimes of drunkenneſs, and prophane ſwearing, they may ſet the offender if he has not eſtate to pay the fine, in the ſtocks. For the crime of ſabbath breaking, they may order the offender to be whipped, on his neglecting to pay the fine: and for ſtealing, if within their juriſdiction, they may inflict the puniſhment of whipping. An indian, negro, or mulatto ſervant, guilty of a breach of peace, may be by them puniſhed with whipping, not exceeding thirty ſtripes. They may ſend to the houſe of correction, certain offenders, deſcribed in the ſtatute reſpecting rogues and vagabonds, which will be fully conſidered when we treat of crimes. They may impriſon for a contempt of court, or bind to the peace and good behaviour. They may grant ſureties of the peace and good behaviour, againſt perſons who diſturb the peace, and on their refuſing to find ſureties, may commit them to goal.

When the offence is not determinable by a juſtice of the peace, he has power to recognize the offender, if the offence be bailable, with ſurety to appear before the court that has juriſdiction, and for want of bail, or if the offence be not bailable, he may commit the offender to goal. Hence it has become a common practice for grandjurors to preſent their informations, to juſtices for all offences: who cauſe the offenders to be apprehended, and proceed to make enquiry, and if there be probable evidence of their guilt, they recognize them to the proper court for trial; if there be no probable evidence againſt them, they are diſmiſſed.

If a juſtice of the peace find the evidence againſt the perſon complained of, to be inſufficient to authoriſe him to bind him over to a court that has cognizance of the offence, he cannot ſubject him to the payment of coſt; for not having juriſdiction of the offence, he cannot render judgment for the payment of coſt. And the law does not intend, that a perſon ſhould be ſubjected to the payment of coſt, where there is not ſufficient evidence to hold him to trial.

Juſtices of the peace have power to iſſue warrants, to be ſerved in any part of the ſtate, to apprehend and bring before them, any

[1] Kirb. Rep. 362.

any perſon againſt whom complaint is made, of committing a crime, for which he ought to be brought before them for trial, or examination. He may likewiſe grant ſummons, or capias for witneſſes in like caſes. Any ſheriff, deputy-ſheriff, or conſtable, to whom ſuch proceſs, ſummons, or capias ſhall be directed by name, and office, may ſerve it in any part of the ſtate, where the perſon cannot be found in the official precincts of ſuch officer. The authority may grant ſuch precept if he judge neceſſary, to ſome ſuitable indifferent perſon, who ſhall have the ſame power to ſerve it as the legal officer. In all qui tam proſecutions, where the offience or demand exceed the juriſdiction of the juſtice, he has a right to recognize the defendant before the proper court for trial, upon the ſame principles as are laid down in public proſecutions.

2. The juriſdiction of juſtices of the peace, in matters of a civil nature, renders the office of much more importance in this ſtate than in England, where they are confined to criminal caſes.—Their civil juriſdiction often renders it neceſſary, for them to determine queſtions of as much difficulty, as any that occur before the higheſt courts. It behoves a juſtice, who wiſhes to execute with fidelity the truſt repoſed in him, to become acquainted with the whole ſyſtem of juriſprudence, and the general aſſembly ought to be extremely cautious about the qualifications of the perſons they appoint. They ought to poſſeſs not only ability and knowledge, but candour and impartiality, above the influence of intrigue, and the prejudice of party.

Juſtices of the peace, have juriſdiction in all caſes wherein the title of land is not concerned, and wherein the debt, treſpaſs, damage, or other matter in demand, do not exeeed four pounds, or if the action be on bond, or note, given for the payment of money, or bills of credit only, vouched by two witneſſes, and the ſum demanded does not exceed ten pounds; if the ſum in demand exceed forty ſhillings, an appeal lies, except in actions on bonds and notes A queſtion has ariſen, whether a note for more than ten pounds, could be indorſed within that ſum, and no more than that ſum demanded, ſo as to bring it within the juriſdiction of a juſtice; but it has been determined, that the face of the note gives the juriſdiction, that an indorſement cannot alter it, for that may be a part of

the dispute, nor can a party wave part of his debt, to lessen it to the jurisdiction of a justice; this ascertains the jurisdiction, and one party shall not alter it without the consent of the other. No appeal lies to an adjourned court. Bonds or notes vouched by two witnesses, and under ten pounds, if either of the witnesses should become interested, or die, will not be within the cognizance of justices, upon the principle adopted respecting appeals.

h A justice of the peace has no jurisdiction to try an arbitration note, if more than four pounds, tho less than ten pounds, and vouched by two witnesses, becauses the sum of the award is the rule of damages, and the note is not for money only, but in the nature of an escrow.

When an action of trespass is brought before a justice of the peace, and the defendant justifies by a plea of title, the facts shall be taken as confessed, the justice shall make a record of it, and take a recognizance of the defendant, that he will pursue his plea of title to the next county court, and shall certify the same to the court with the whole process.

i In all actions brought before justices of the peace, for raising or obstructing the waters of any stream, river, arm of the sea or creek, by the raising or continuance of any mill dam, or other obstruction, in which the defendant shall plead, that he has right to do the act; an appeal lies from the judgment of the justice of the peace, to the next county court, upon giving good and sufficient bond with sureties, to prosecute the appeal, and in like manner, to the superior court.

A justice of the peace, has power to take and accept the confession and acknowledgment of any debt, not exceeding twenty pounds exclusive of the cost, from debtor to his creditor, either upon or without any antecedent process, as the parties shall agree, which can be done only by the debtor in person. Of which confession the justice must make a record, and may grant execution. *k* It has been determined that the judgment should express the particular debt or duty, about which it is conversant, as bond, note or book, that the judgment may be a bar to an action brought for the same thing; *l* and that

h Desborough vs Desborough, S. C. 1789. *i* Statutes 479.
k Lamb 152. *l* Ibid. 1[illegible].

that the judgment muſt not be for more coſt than his own fee, unleſs upon an antecedent proceſs which muſt appear of record.

n It has been adjudged, that a juſtice of the peace cannot take a confeſſion on an an arbitration note, for he is to take confeſſion only in caſe of a juſt and liquidated debt; if the confeſſion of judgment upon arbitration notes be admitted, the party can have no day in court to object againſt the award, let it be ever ſo irregularly made.

o It has been adjudged by the ſuperior court, that a juſtice of the peace cannot go out of the town in which he dwells, to try a cauſe, unleſs there be no juſtices of the peace in ſuch town, who are legally qualified to try the ſame.

The juriſdiction of juſtices of the peace, extends to the execution of the ſtatute, directing proceedings againſt forcible entry and detainer: two aſſiſtants, or two juſtices, one being of the quorum, or one aſſiſtant and one juſtice, have the authority to enquire by a jury of forcible entries and detainers, of houſes, lands, tenements, and other poſſeſſions, and cauſe the perſon who is forcibly diſſeized or held out of poſſeſſion, to be reſeized.

Juſtices of the peace may adminiſter the oath preſcribed by ſtatute, to poor debtors. If a juſtice of the peace, render a judgment, and before the ſame be ſatisfied, or execution granted, be removed by death or otherwiſe, the perſon in whoſe favour the judgment is, may bring action of debt at any time within five years, before an aſſiſtant, or juſtice of the peace, if it does not exceed ten pounds, if it exceeds ten pounds, the action muſt be brought to a higher court.

Juſtices of the peace are conſidered as the civil authority of the town, in which they dwell, and have extenſive power in directing and adviſing about the management of the affairs of the town, which will be conſidered in the proper place. There are many other ſmaller matters within the juriſdiction of juſtices, as mentioned by the ſtatutes, but which cannot be enumerated in an elementary treatiſe.

A

n Curtiss vs. Bulkley, S. C. 1791 o Palmer vs Palmer, S. C. 1790.

A diſtinction is made between their judicial and miniſterial office. In trying cauſes, they act judicially. In taking depoſitions, acknowledgments of deeds, and many other matters, they act miniſterially.

This conciſe account of our courts of juſtice opens a proſpect that muſt excite admiration and applauſe. The beautiful gradation from the loweſt to the higheſt, the certain limits and bounds of their reſpective juriſdictions, the ſmallneſs of their number and the ſimplicity of the whole inſtitution, exhibit, the moſt excellent ſyſtem for the adminiſtration of juſtice, that has hitherto been adopted. From the ſupreme power the ſtreams of juſtice iſſue, and are diſtributed through every part, and to every individual of the ſtate. Juſtices of the peace are appointed in every town, to decide and ſettle the inferior controverſies between the people. From their courts, appeals lie to the courts of common pleas, in each county. Theſe courts beſides this appellate juriſdiction, have original juriſdiction in all caſes of higher importance. To avoid unreaſonable delay, and that the expence of trial, may not ſurmount the value of the matter in diſpute, all actions of a certain deſcription are finally tried, and determined in theſe courts. But in actions of greater magnitude, and for the purpoſe that uniform juſtice may be diffuſed, and eſtabliſhed thro the ſtate, appeals may be taken to the ſuperior court, which preſides over the ſtate, and holds courts in every county. By this method the ſame rule of right and the ſame principles of juſtice, are diſtributed to all the citizens, and the laws become uniform, conſiſtent, and univerſal. That queſtions of law may be ſettled with the utmoſt preciſion, and ſolemnity, writs of error lie from this court to the ſupreme court of errors. To this court nothing appears but the facts as ſtated, and conſidered in the pleadings, which gives them the faireſt opportunity to inveſtigate, and decide the abſtract principles of law, without that bias and prejudice which imperceptibly operate upon the minds of courts, who are equally concerned at the ſame time in the diſcovery of the truth of facts, and the determination of points of law.

This ſlight view of the ſyſtem of our courts, muſt convince every

perſon

perſon that it is the beſt calculated to avoid delay, and expence, and at the ſame time furniſh the parties a fair, and reaſonable chance to obtain juſtice, of any inſtitution in the power of human wiſdom to deviſe. That ſuits will be attended with expence, and that delays will ſometimes neceſſarily happen, cannot be denied. A thouſand cauſes will intervene, to render delays juſtifiable, and create expence. But if this delay does not ariſe neceſſarily from the inſtitution, but is admitted, and calculated to promote juſtice, by giving a fair opportunity to prepare for trial, it cannot be deemed a fault, but muſt be acknowledged to be an excellence. In this ſtate no delays ariſe from the inſtitution of our courts, which the party can take advantage of, to put off the trial, tho not neceſſary to enable him to prepare for it, as is the caſe in England, and moſt other countries. But every action comes regularly to trial, at the term to which it is brought, unleſs good reaſons can be given to induce the court to order a delay. In the adminiſtration of juſtice, it is true that unneceſſary and unreaſonable delays, may happen, but this muſt be attributed to the imperfection of human judgment, and not to any defect in the inſtitution. But it is eaſy for by-ſtanders who view only the ſuperſtructure, without underſtanding the groundwork, to cenſure as faults, what they would admire as beauties, if they could comprehend the whole plan. So mortals, who have but a partial proſpect of the ſyſtem of the univerſe, conſider that to be evil, which if they could fathom the councils of eternity, they would pronounce the moſt perfect good.

CHAPTER FIFTH.

OF COUNTIES.

THE ſtate is divided into eight counties for the more convenient adminiſtration of juſtice. [p] In every county town, court houſes and goals, muſt be erected and kept in repair. The aſſiſtants and juſtices of the peace in the ſeveral counties, are empowered to tax the inhabitants, for building, repairing, and furniſhing the court houſes and goals: and are from time to time, to order, direct and take

[p] Statutes 89.

take care of the goals, and keep them in repair. The county courts may appoint collectors in the respective towns, who for refusing to accept the office, are subjected to a penalty of forty shillings; and the collectors have the same power and fees, as the collectors of state taxes, and failing to make collection and payment, the treasurer of the county may issue his warrant to some proper officer, to levy and collect of them, such sums as may be due.

All persons committed to goal for any crime, must, if they have estate, defray the expence; if not, may be disposed of in service for that purpose. All prisoners are permitted to provide what food they please, and send for it where they please, and to use bedding, linen, and other necessaries as they think fit, neither shall the goal keeper demand greater fees for commitment, discharge, and chamber room, than what is allowed by law: and for any offence therein, he shall pay treble damages to the party injured, and be subject to such fine as the court shall see fit to inflict. The prisoners for debt, and felons shall not be lodged in the same room, in the prison, and if the gealer or keeper of the prison, shall offend herein, he is liable to pay treble damages to the party grieved.

The county courts have power to fix and establish certain limits adjoining the prison, which constitute the liberties of the prison, and the sheriff has discretionary power, to take bonds of prisoners confined in civil matters that they will not depart the limits of the prison, and then they may be enlarged.

The county is responsible for all escapes of prisoners, thro the insufficiency of the goal; and in case there be no money in the treasury, they may tax the inhabitants, appoint collectors, and enforce the collection; [q] but no process will lie against the county, in any case but for an escape. [r] The judges of the county courts may summon together the assistants and justices of the peace, the major part of whom have power to build work-houses in each county, and levy taxes to defray the expence. The county courts have power to appoint overseers, and masters of the work-houses, and to do every thing necessary to accomplish the business.

The several goals in the counties are made work-houses, or houses of correction, till work-houses are erected, and the keepers of the

[q] Lyon vs. Sturges, S. C. 1793. [r] Statutes 216.

the goals, or ſuch perſons as they ſhall appoint, are maſters, or keepers of the goals, as houſes of correction, with all the power of maſters of houſes of correction; and all perſons ordered to be ſent to the houſe of correction, are to be received, and kept in the goals, as houſes of correction, till ſuch houſes are built, in conſequence of this proviſion, no houſes of correction have been erected, and the goals are uſed for that purpoſe.

The maſters are to keep the perſons ſent to the houſe of correction to ſuch labor, as they are able to perform, for the time they are ordered to continue there. To compel them to perform their taſks, or if they are diſorderly, ſtubborn, or idle, they may puniſh them by putting fetters, and ſhackles on them, by moderate whipping, not exceeding ten ſtripes at a time, or may abridge them of their food, as the caſe may require, till they are reduced to better order and obedience. For eſcapes, the priſoners may be whipped, not exceeding thirty ſtripes.

f The ſtate furniſhes materials for the labour of thoſe who do not belong to any town in the ſtate; if they belong to any town, the ſelectmen are to provide at the expence of the town; and if they are ſtubborn children, or ſervants, their parents or maſters muſt pay the charge of ſuch materials, if able; each offender is allowed two thirds of his earnings for his ſupport, and the overplus is to be accounted for by the maſter of the houſe. If heads of families are committed, the profit of their labor, or ſo much as the county court ſhall think neceſſary, may be applied to ſupport their families. In caſe of ſickneſs, or inability to work, the keeper muſt ſupport them, and the expenſe is to be reimburſed by thoſe who are bound to pay for the materials for their labor. The maſter, or keeper is to be allowed reaſonable compenſation, is to ſettle his accounts with the county court, and may be puniſhed at their direction for any neglect of duty.

The county courts appoint a treaſurer, who can pay out money only by their order. He ſuperintends the collection of county taxes, and may iſſue warrants for that purpoſe. He muſt iſſue warrants for the collection of all fines and forfeitures, belonging to the county treaſury, in one year after they are impoſed, on penalty

f Statutes, 209.

of forty ſhillings. He muſt keep weights and meaſures in the county town, as ſtandards for the county, to be ſealed by the ſtate ſtandard.

The liability of counties to reſpond damages for the eſcape of priſoners, thro the inſufficiency of the goal, may with propriety be conſidered in this place.

The ſtatute provides, that if any perſon lawfully committed, ſhall break goal, and make his eſcape by reaſon or means of the inſufficiency of the goal, the damages ſuſtained by reaſon of ſuch eſcape, ſhall be paid out of the county treaſury, with a ſaving that nothing in the act ſhall be conſtrued to prejudice, or hinder any perſon or perſons, from recovering any expence, coſt or damage of the perſon or perſons, or out of the eſtate of ſuch perſon or perſons, who ſhall be aiding, or aſſiſting in breaking the goal, or who ſhall eſcape or be aiding thereto, and when ſuch remedy or ſatisfaction may be had, the county ſhall not be charged with, nor ordered to pay the ſaid expenſe, coſt, or damage.

In England the ſheriff provides the goal, and of courſe is reſponſible for any eſcape by reaſon of its inſufficiency. But in this ſtate, as the county are obliged to provide the goal, the ſheriff is only accountable for the cuſtody, and the county are liable for eſcapes by reaſon of its inſufficiency. It is of importance to public juſtice, and the peace of ſociety, that priſoners ſhould be ſecurely kept. It is therefore eſtabliſhed, as a general principle, that the county ſhall be reſponſible for all eſcapes by the inſufficiency of the goal, that do not happen by fire, public enemies, or the providence of God. Againſt theſe, it is unreaſonable to require that counties ſhould provide. This reduces the point of inſufficiency to a certainty. It will be in vain to ſay that the goal was erected of ſufficient ſtrength, becauſe it appeared to be ſufficient to reſtrain common perſons, and the priſoner eſcaped by uncommon means. If he were able to make his eſcape in any other manner than by reaſon of fire, public enemies, or the providence of God, the law determines the goal to be inſufficient.

It is therefore no excuſe for the county, that the priſoner broke

out

out by the help of implements handed in at the window. It is their duty to provide a ſufficient goal, which they do not, if priſoners can break out of it with or without implements. If the goal is left acceſſible to perſons without, and is of a conſtruction and materials, that by the ſecret uſe of implements, it can be broken, it is not the place of ſecurity which the law intends. It is the ſheriff's duty to defend the goal againſt open and riotous attempts, but it clearly devolves on the county ſo to build, and ſecure it, that it ſhall not be liable to be broken ſecretly, without the knowledge of a vigilant keeper.

If perſons aid, and aſſiſt the eſcape of a priſoner, and have ſufficient eſtate to pay the damages, and are known to the creditor, he muſt firſt ſeek his remedy againſt them, but if they are unknown to him, or unable to reſpond the damages, his challenge is directly upon the county.

The ſtatute makes no proviſion in favour of the county, upon recaption by freſh purſuit. It would ſeem, however, reaſonable, that in ſuch caſes the principles of the common law ought to apply, but if the recaption be after the commencement of the ſuit, it will be no excuſe by the common law.

The ſtatute enacts that the coſt and damage ſhall firſt be juſtly aſcertained and allowed, and the county ordered to pay it. Upon the idea of a juſt aſcertainment of the coſt and damage, the courts have adopted a conſtruction, that enquiry may be made with reſpect to the ability of the priſoner, who has made his eſcape, to pay, and if he had taken the poor-priſoners oath before his eſcape, and was wholly unable to diſcharge the debt, then they ſay that no coſt, or damage has accrued to the creditor, by the eſcape, and that the county in juſtice are not liable to pay the debt for which he was confined; but if there be proof, or a probability that the priſoner could have paid all, or any part of the debt, they will order the payment of ſuch ſums as ſhall appear to be juſt and reaſonable under the ſpecial circumſtances of the caſe, and that ſpecial damages are only to be given, inſtead of the whole ſum for which the priſoner eſcaping was committed. [t]

[t] Stapleford vs. County of New-Haven, 8 G. 1769.

The application is by a petition to the court of common pleas in the county, where the eſcape happened; but if any party be aggrieved by the denial, or determination of the county court, they may appeal to the ſuperior court, who may hear, and determine the ſame, and order the payment of ſuch damages, and coſt ariſing on the appeal, as they judge reaſonable.

Chapter Sixth.

OF TOWNS AND TOWN OFFICERS.

THE impoſſibility of collecting all the people in one body, to elect their rulers, and the difficulty of exerting ſufficient energy to govern the ſtate, while it remains a ſingle corporation, has rendered neceſſary, a number of ſubordinate diviſions. Connecticut is divided into a number of ſmall corporations, called towns. The extent of territory, and the number of inhabitants in each, are ſuch, that they may conveniently aſſemble to elect their rulers, and manage their common concerns and intereſt. Theſe corporations are veſted with certain powers and privileges, for their internal regulation and government. All the inhabitants convene, they have a right to elect their own officers, and poſſeſs ſome power of a legiſlative nature. Here we may behold an epitome of a pure, unmixed, democracy, and it is here, that the people have the direct and immediate exerciſe of their power, and privileges as freemen.

As towns are created by ſtatute, which are clear and explicit, it will be unneceſſary to treat of them at large. I ſhall only give a general account, for the purpoſe of exhibiting a compleat view of the government of the ſtate, which will be more eaſily acquired in this way, than by reading the ſtatutes in an alphabetical arrangment. I ſhall handle the ſubject under the following diviſions. 1. Of the powers of towns. 2. Of their meetings, and the regulations of them. 3. Who may vote in town meetings. 4. The officers of towns, with their power and duty.

1. Of the power of towns. They are communities or corporations—capable of ſuing and being ſued, of proſecuting and defending

fending in any action. They have power to make ſuch orders, rules, and conſtitutions, as concern the welfare of the town, provided that they be not of a criminal, but of a prudential nature, and that the penalties exceed not twenty ſhillings for one offence; and that they be not repugnant to the laws and orders of the ſtate. All votes, acts, and orders of the town, ſhall be made by the major part of the qualified voters there preſent, and being ſo made, ſhall be deemed the act of the whole. They have the general power to do all acts that are neceſſary to promote their intereſt, and defend their rights.

They have the power of appointing ſuch officers as will be hereafter enumerated. They muſt ſupport their poor. They may lay taxes to defray their expences and pay their debts, and may appoint collectors. They muſt repair highways, and for that purpoſe, may divide the town into diſtricts. They muſt maintain and keep up neceſſary bridges.

If any perſon loſe his life, by the defect or inſufficiency of any bridge or highway, after warning given to any of the ſelectmen in writing under the hands of two witneſſes, or a preſentment to the county court, the town ſhall pay a fine of one hundred pounds, to the parents, huſband, wife, child, or next of kin, to the perſon deceaſed. If a perſon loſe a limb, break a bone, or receive a wound, by means of ſuch defect, the town ſhall pay to him double damage; ſo for an injury to any team, cart or carriage, horſe or other beaſt, or loading, double damages are recoverable.

Upon complaint made of any town, to an aſſiſtant or juſtice of the peace, they are empowered to iſſue a warrant to the conſtable, to impreſs ſuch workmen in their town as may be neceſſary to ſecure and repair any defective bridge or paſſage, which ſhall be paid by the town who ought to maintain the ſame. If a town neglect, or refuſe to build, or repair a bridge acroſs a river in the highway, or if towns neglect, where the river is the dividing line, it being their joint duty, on complaint by any perſon to the county court, they may enquire by a committee or otherwiſe into the neceſſity of the bridge, cauſing notice to be given to the ſelectmen, to ſhew reaſon why they ſhould not be compelled

led to make or repair ſuch bridge, and if no reaſon be ſhewn to the contrary, and ſuch towns ſtill neglect, ſaid court may appoint ſome proper perſon to do it, and award execution for the expenſe againſt the town.

[w] It has been adjudged by the ſuperior court, that an action will lie at common law, againſt any town, for damage done by the defect of a bridge.

[w] In an action on the ſtatue reſpecting bridges, againſt a town, in which the plaintiff declared that he loſt a horſe &c. in attempting to paſs a bridge, by the deficiency thereof, which the defendants were bound to keep in repair, and had notice that the ſame was out of repair, it was decided, that it was not neceſſary that notice ſhould be given in writing to the town, to recover double damages, and that ſuch notice was neceſſary only where a life was loſt, and the action was to recover the forfeiture of one hundred pounds.

2. Of town meetings, and the regulations of them.—Theſe are held by warning, or notification from the ſelectmen, on ſuch occaſions and at ſuch times as their intereſt requires,—but four days notice muſt be given. They are bound to hold meetings annually in the month of December, to elect their officers: when the inhabitants are convened, they proceed to the choice of a moderator, to preſide in the meeting. No perſon has a right to ſpeak without his liberty, unleſs it be to aſk liberty to ſpeak. The moderator has the power to keep good order and command ſilence. All diſturbances in ſuch meetings, by preventing the choice of a moderator, abuſing him when choſen, or refuſing to keep ſilence when commanded, are puniſhable by a fine of five ſhillings, and if the offence be aggravated by ſome notorious breach of the peace, the offender may be bound to the next county court, who may impoſe a fine not exceeding ten pounds. And no meeting can be adjourned, but by the major part of the members preſent.

3. The perſons who may vote in town meetings, are all freeholders, and lawful inhabitants, that have a freehold eſtate rated in the common liſt at fifty ſhillings, or perſonal eſtate at forty pounds

[w] Bridge vs. Town of Pomfret, S. C. 1778.

[w] Swift vs. Town of Kent

pounds, beſides his poll, and that are twenty-one years of age. All other perſons that preſume to act, vote, deal, or intermeddle, are liable to a fine of fifteen ſhillings for every offence.

4. Of town officers with their power and duty, and 1. The ſelectmen, conſiſting of a number of the inhabitants, not exceeding ſeven, who take care of, and order the prudential affairs of the town. They are by office, overſeers of the poor, and each town being obliged to take care of and maintain their own poor, this becomes a principal part of the duty of the ſelectmen.

The ſelectmen are bound to provide neceſſaries for all the inhabitants of the town, who are incapable of ſupporting themſelves. Towns are obliged to ſupport their reſpective inhabitants, whether living in the town to which they belong, or any other town, either with or without a certificate, who may need relief. If any perſon belonging to any other town, ſhall by ſickneſs or otherwiſe be reduced to neceſſitous circumſtances, it is the duty of the ſelectmen of the town where he is taken ſick, to provide for his ſupport, and they may lay an account of the expenſe before the county court, in the county where the town is, to which ſuch perſon belongs, who having adjuſted the ſame, may order the town to pay it, and grant execution accordingly, or the town may bring an action at common law, for the recovery of ſuch expenſe, provided that ſuch perſons have not any eſtate, and no parents or maſters, or any relations that are bound to ſupport them. And if they have, then the expenſe is recoverable of thoſe perſons who are bound to provide ſupport.

But if any perſon that has not gained a legal ſettlement in the town, ſhall by ſickneſs or otherwiſe, be reduced to neceſſitous circumſtances, then if any inhabitant of the town or other perſon in the town where ſuch perſon is in want, have entertained him for the ſpace of fourteen days without giving ſufficient notice thereof, to the ſelectmen of the town, then ſuch inhabitant, or ſuch other perſon, ſhall ſupport and ſuſtain the whole expenſe—but if notice be given by ſuch perſon within fourteen days to the ſelectmen, he is excuſed. The ſevere proviſion of this law, renders it neceſſary for people to be cautious about entertaining poor ſtrangers: for if a poor perſon belonging to neighbouring town, that has relations to

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ſupport him, or the town is bound to ſupport him, or if he belong to any of the United States, excepting this ſtate, or if he be a foreigner, ſhall be entertained more than fourteen days, without notice given to the ſelectmen, the entertainer muſt defray the expenſe, and can have no remedy to recover it from the relations, or the town that ought to ſupport the perſon, or from the town where he is ſick.

If any perſon not an inhabitant of any town in this ſtate, ſhall be permitted to reſide in any town, for the term of three months, without being warned to depart therefrom, notice being given to the ſelectmen, by any individual within fourteen days, if any have entertained him ſo long, then if ſuch perſon be reduced to neceſſitous circumſtances, by ſickneſs or otherwiſe, ſuch town muſt defray the expenſe.

But if the town have warned ſuch ſick and indigent perſon, within three months to depart the town, then the expenſe ſhall be defrayed out of the treaſury of the ſtate, by order of the governor and council: but no expenſe is paid by the ſtate, excepting what ariſes within the three months after ſuch ſtranger comes into the town, and within which he has been warned, unleſs it be expenſe incurred by ſickneſs, or lameneſs, that commenced within the three months and continued after that time: and then the expenſe thus incurred, until the time that the perſon ſhall ſo far recover of his ſickneſs, or lameneſs, as to render it ſafe to remove him, ſhall be defrayed by the ſtate. But in all caſes, as well of foreigners, as perſons belonging to any of the United States, if they are permitted to reſide in any town, after they have ſo far recoved as to be removed with ſafety, and are again taken ſick, or who ſhall be permitted to reſide in any town after three months, and then ſhall be taken ſick—the town where they are ſuffered to reſide, muſt defray the expenſe, and cannot call upon the ſtate. This renders it neceſſary for towns to be careful about ſuffering perſons not belonging to any town in this ſtate, to remain there longer than three months, or after they have recovered from ſickneſs, that commenced within three months, as they take upon themſelves the burden of their ſupport, in caſe they are reduced to want. But this proviſion of

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the law is well calculated to ſave expenſe to the ſtate; for towns will be much more cautious about ſuffering foreigners to reſide in them, when they can recover no maintenance from the ſtate, only for ſickneſs, commencing in three months after their coming: and the treaſury will not be drained by thoſe enormous bills, which towns are frequently too willing to enhance, becauſe they are paid by the ſtate. Theſe regulations for the ſupport of the poor extend to every caſe that can ariſe, unleſs perhaps there may be exception, where it ſo happens that the perſon who entertaining a poor ſtranger fourteen days without notice, is unable to ſupport him; then the law has made no proviſion for his ſupport; in every other reſpect the law has made proviſion for the ſupport of the poor, ſo that every one may know where to call for his bread in the hour of want. This liberal and general proviſion of the law, has in a great meaſure ſuperſeded the neceſſity of the exerciſe of the God-like virtue of charity, but the benevolent may find many inſtances of private diſtreſs, which the law does not relieve to call for the acts of generoſity. It may however be remarked, that the ſtraggling beggar is generally to be ſuſpected, for he who does not accept of the proviſion made by law, but prefers roving round the country to collect what he can, by exciting the compaſſion of the people, acts upon the principle of a knave, and ſuch is ſo generally the character of thoſe wandering mendicants, that the moſt liberal mind, will beſtow upon them with a cautious hand.

It is the duty of the ſelectmen to warn perſons not legal inhabitants of the town to depart the town, to procure them to be tranſported to the places where they belong, and to proſecute them when they neglect to depart the town on being warned.

Where there are any perſons who have been, or are maintained by the town who ſuffer their children to live idly, and miſpend their time, or neglect to bring them up, or employ them in ſome honeſt calling, or if there be any family who cannot, and do not make ſufficient proviſion for ſupport of their children, or if there be any children who live idly, and are expoſed to want, having none to take care of them, then the ſelectmen with the aſſent of the next aſſiſtant or juſtice of the peace, are empowered to bind them out to

be ſervants or apprentices, males till they are twenty-one, and females till they are eighteen.

* A boy having no father, guardian, or maſter, lived with his mother who had married a ſecond huſband where he was well provided for, and educated—Three of the ſelectmen of the town, there being five, bound him an apprentice, one of which, being a juſtice of the peace approved of the indenture which was afterwards approved by another juſtice of the peace. It was determined that the boy under ſuch circumſtances was not liable to be bound out by the ſelectmen, that the ſelectman who was a juſtice could not act, at the ſame time in both capacities, which rendered the indenture void at the time it was pretended to be executed, and that a ſubſequent aſſent by another juſtice of the peace, could not make good what was originally void. The faireſt and moſt reaſonable conſtruction of the ſtatute is that the ſelectmen ſhall not bind out as apprentices, children unleſs they, or their parents are actually ſupported by the town.

The ſelectmen are to inſpect the conduct of families in the education of children, and ſee that they inſtruct, or cauſe their children to be inſtructed to read the Engliſh language, to know the laws againſt capital offences, and to learn the rudiments of religion. If parents, or maſters after admonition, ſhall neglect their duty and the children grow rude, ſtubborn and unruly, then the ſelectmen by the advice of the next aſſiſtant, or juſtice of the peace, are impowered to take ſuch children, or apprentices, and bind them out ſo that they may be inſtructed, and governed, males till they are twenty-one and females till they are eighteen. The ſelectmen together with the civil authority are viſitors of the ſchools. They have power to ſuppreſs riots, and read the riot act.

It is the duty of the ſelectmen to inſpect the affairs and management of all perſons in their their towns; and if they find any who are reduced, or who are likely to be reduced to want, by idleneſs, miſmanagement, or bad huſbandry, they may appoint an overſeer, to adviſe, direct, and order him for ſuch time as they ſhall think proper. A certificate of which they muſt ſet upon the public ſign-

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* Strong vs. Brockway, S. C. 1794.

poſt, and lodge a copy in the office of the town clerk; by which ſuch perſon is rendered incapable of making any contract, without the conſent of ſuch overſeer. If this method fail to reform ſuch perſon, or without appointing an overſeer, if judged proper, the ſelectmen may make application to the next aſſiſtant or juſtice of the peace, who may iſſue a warrant to apprehend him for examination, and to be dealt with according to law. If the perſon abſcond, or cannot be taken, then the officer ſhall ſerve the warrant by leaving a copy at the laſt place of his abode. After this proceeding the ſelectmen, if no ſufficient reaſon be offered to the contrary, with the advice of ſaid aſſiſtant, or juſtice of the peace, are empowered to take ſuch perſon, and his family under their care, and aſſign, bind, and diſpoſe of them in ſervice, as they ſhall think beſt. They are authoriſed, by the advice of ſaid aſſiſtant, or juſtice, to take into their hands all the eſtate, both real and perſonal of ſuch perſon, and the ſame diſpoſe of, and improve for the benefit of ſuch perſon or his heirs; but may not ſell lands without liberty of the general aſſembly. A certificate of their proceedings ſhall be ſet on the ſign-poſt, and lodged with the town-clerk, and within ten days an inventory of all the perſonal eſtate appraiſed by indifferent men under oath, ſhall be made, and lodged with the town-clerk. If any perſon withhold the eſtate, or credits of ſuch perſon, the ſelectmen are impowered to recover the ſame by ſuit, or otherwiſe, and inventory the ſame; and they are to pay all juſt debts. Such perſon is diſabled from making any contract, that ſhall be valid in law. He may apply to the county court, if aggrieved with the doings, who upon hearing the caſe, have power to afford ſuch relief as they think proper.

This mode of proceeding is peculiar to this ſtate, and ſome part of it hardly compatible with the ideas of freedom. For the ſelectmen to take a man, with his family, and all his eſtate into their cuſtody, and aſſign the man, and his family in ſervice, and improve his eſtate as they pleaſe, is the exerciſe of a power, that the good of ſociety cannot require, and which is repugnant to our ideas of civil liberty. There have been few inſtances where this power has been exerted, and where it is, the conſequence generally, is the

very ruin of the family, and deſtruction of property, which the meaſure is intended to prevent. Perhaps the appointment of an overſeer to prevent a perſon from making imprudent bargains, may ſometimes anſwer a ſalutary purpoſe: and probably all the purpoſe that ever can be effected by all the reſtraint upon the natural liberty of man, which the whole of this proceſs contains.

y We find a ſimilar regulation was adopted by the Roman law, for where they found a man prodigal to that degree, that there was danger that he would ſquander away his eſtate, the magiſtrate interdicted him the adminiſtration or management of his eſtate, and committed the care of it to a curator, and then ſuch perſon had no power to make contracts.

The ſelectmen, together with the civil authority, conſtables, and grand-jurors, annually meet ſome time in January, and nominate proper perſons to keep houſes of public entertainment in their towns the enſuing year, and alſo to nominate jurors. If any perſon who is nominated to be a tavern keeper, ſhall neglect to take out licence, or be denied licence by the county court, or ſhall remove, or be legally ſuſpended, or if an addition to the number ſhall be judged convenient and neceſſary, they may on proper notice, convene at any other time within the year, and nominate proper perſons. They ſhall certify ſuch nomination to the next county court.

The ſelectmen, together with the civil authority, are to inſpect the conduct of tavernkeepers, and if from their own obſervation, or the information of others, they find that they do not obſerve the law, they may cite them before them, and examine into the matter by proper evidence. If they find the tavernkeeper in fault, they may admoniſh him, or if they think proper, they may ſuſpend his licence, till the next county court, and ſhall cauſe a copy of ſuch order of ſuſpenſion to be left with the taverner, and his houſe ſhall be under the ſame reſtraint as unlicenced houſes. A certificate of theſe proceedings ſhall be ſent to the next county court in the county. The ſelectmen, with the civil authority, and grandjurors, may poſt tavern haunters, by ſetting up their names at every tavern in the town, and prohibiting every tavern-keeper from entertaining or ſuffering them to have any ſtrong liquor.

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y Domat's Civil law, 24, 276.

The ſelectmen may lay out public highways, or private ways, as they ſhall judge needful, in the town, giving reaſonable notice to the owners of the land thro which they are laid, or leaving notice in writing at the place of their abode, if within this ſtate. The damage ſhall be paid by the town, if the highway be for public uſe, but if for private uſe, by the perſons applying. A ſurvey in writing, ſigned by the ſelectmen, and containing a deſcription of the road, muſt be accepted by the town, and recorded in the records of lands, and ſatisfaction made to the perſons damnified, or the money be depoſited in the town treaſury for their uſe, ready for them when they apply, according to an eſtimate made by three judicious diſintereſted freeholders under oath, appointed by juſtices of the peace, or as the ſelectmen, and parties intereſted agree; then the highway becomes eſtabliſhed. The party aggrieved in any reſpect, may apply in eight months to the county court, who may appoint a committee or jury to enquire, and grant relief, either by diſcontinuing ſuch highway, or private way, or increaſing damages. If any perſon thro whoſe land ſuch way paſſes, ſhall declare himſelf aggrieved, the ſame ſhall not be opened till the expiration of twelve months, to give him time to apply to the county court.

The ſelectmen with the civil authority, have power to make proper regulations reſpecting mad dogs.

When a woman that has a baſtard child neglects to bring forward a ſuit for maintenance, or commences a ſuit, and fails to proſecute to final judgment, the ſelectmen of any town intereſted in the ſupport of any ſuch baſtard child, where ſufficient ſecurity is not offered to ſave the town from expenſe, may bring forward a ſuit in behalf of the town againſt him who is accuſed of begetting ſuch child, or may take up and proſecute a ſuit begun by the mother of the child. They muſt appoint two or more perſons to renew the bounds between their towns, and the adjoining towns, at leaſt once a year in the months of March, April, October or November. The ſelectmen of the moſt ancient town muſt give notice to the ſelectmen of the other towns of the time and place of their meeting for perambulation ſix days before-hand on penalty of four pounds.

The ſelect men have certain powers veſted in them to prevent

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the ſpreading of contagious ſickneſs, as preſcribed by ſtatute. They may give certificates of the qualifications of perſons to be freemen, under a penalty of three pounds ſix ſhillings, for a falſe certificate. It is their duty to erect, and keep up mile-ſtones, on the road, marked with the diſtance from the county town on penalty of forty ſhillings, and to erect ſtocks, and ſign poſts: it is their duty to ſee that all town officers who are choſen, of whom an oath is required, are ſummoned and ſworn according to law. They may aſſeſs the town to raiſe money to defray expenſes, in doing what is required by law if the town neglect to do it. They are to procure at the expenſe of the town, and keep ſtandard weights, and meaſures, tried and ſealed by the county ſtandards, on penalty of forty ſhillings. They are to ſettle and adjuſt accounts againſt the town, and may draw on the treaſurer for payment.

2. The town clerk, or regiſter muſt be ſworn, and his duty is to enter and record all town votes, orders, grants and diviſions of land; to record all marriages, births, and deaths of perſons in their towns, and to record all conveyances, and mortgages of houſes, and lands lying in ſuch town, which ſhall be preſented to him. He is to note on the conveyance, or mortgage, the day, month and year of receiving them, and the record ſhall bear the ſame date. When there is no aſſiſtant or juſtice of the peace, reſiding in a town, he may adminiſter the oath to town officers. They are annually in May to ſend to the treaſurer of the ſtate, the name of the perſons who is choſen conſtable, to collect the ſtate rate. They ſhall enroll the names of all perſons who are admitted freemen.

* It has been adjudged that a town clerk being a public officer, having received a deed for record, may not ſuffer it to go out of his hands unrecorded, and if he does will be liable to any perſon who ſhall receive prejudice thereby.

3. The town treaſurer muſt be ſworn, and they have power to receive all monies, that ſhall become due to the town, by rates, fines, aſſeſſments, or otherwiſe and ſhall pay and deliver out the ſame according to the order of the town, or ſelectmen, keeping an account

* Willard, vs Hutchinſon, S. C. 1794.

account of the receipts and deliveries, and accounting with the town, or ſelectmen, at leaſt once a year. It is the duty of the treaſurer to apply to the civil authority, for an account of all ſuch fines, and forfeitures as ſhall be recovered by judgment before ſuch authority, belonging to the treaſury of the town, where ſuch judgment is given, at leaſt once a year and receive the ſame for the town.

4. Conſtables muſt be ſworn. The town may elect a proper number to do the buſineſs. Their power is reſtricted to the town for which they are appointed, in which they have the ſame as ſheriffs in the county. They may raiſe, put forth, and purſue hue and cries to effect. They may without warrant, apprehend ſuch as are guilty of drunkenneſs, prophane ſwearing, and ſabbath breaking, alſo vagrant perſons, and unſeaſonable nightwalkers, provided they are taken on ſight of the conſtable, or preſent information of others. They may make ſearch for all ſuſpected perſons, on the ſabbath or other days, in taverns, or other ſuſpected places or houſes, and apprehend and keep in ſafe cuſtody, till opportunity ſerves to bring them before the next aſſiſtant, or juſtice of the peace. It is their duty at all times, to ſearch all ſuſpected places for tiplers. The firſt conſtable choſen by the town, is alſo choſen collector of ſtate taxes, which devolves upon him an additional duty. Upon receiving a warrant from the treaſurer, he is to appoint the time and place for the inhabitants of the town to pay their rates, and ſhall give reaſonable notice to them, and on their neglect to pay, then he has power to levy on their perſonal eſtate, if any can be found, if not, he may take real eſtate, or he may levy upon the body of ſuch perſon, and commit him to goal. His warrant to collect the rates becomes an execution, and he muſt proceed with it accordingly.

a In an action againſt a town for the default of a conſtable in not duly ſerving a writ, he being a bankrupt, and in failing circumſtances, at the time of his appointment, it was adjudged that towns are not reſponſible for the conduct of conſtables, whom they appoint, for they have no power to controul them or to require them to find ſurety, and are bound by law to appoint them.

5. Surveyors

a Hulbut, vs Litchfield, S. C. 1733.

5. Surveyors of highways. The towns as often as they judge neceſſary, at their annual meetings may vote and agree, that the ſelectmen may lay out to each ſurveyor, his diſtrict, and what perſons ſhall labour under ſuch ſurveyor, and to alter ſuch diſtricts as occaſion may require. When ſuch diviſions are made, it is uſual for the towns to appoint a ſurveyor in each diſtrict, who muſt be ſworn, and who have a right to call out all perſons in the town from ſixteen years of age to ſixty, including indian, melatto, and negro ſervants, or ſlaves, excepting magiſtrates, juſtices of the peace, goſpel-miniſters, ruling elders, allowed phyſicians, conſtant ſchool-maſters, and millers, two days at leaſt in a year, if their need be, and as many more as he ſhall judge neceſſary, which perſons are to be directed by the ſurveyors. They may warn out teams. Three days warning muſt be given, before the day appointed for ſuch employment. If any perſon neglect ſuch ſervice, after warning, it is the duty of the ſurveyor to make preſentment to an aſſiſtant or juſtice of the peace, of ſuch perſons and their neglect, and if ſuch perſons do not in one week give ſufficient reaſons for their neglect, to ſuch aſſiſtant or juſtice, he ſhall grant and levy a forfeiture of two ſhillings and three pence per day, for a man and double that ſum, for a man and team, which ſhall be delivered to the ſurveyor, who ſhall lay out ſuch monies on the highway, and if the ſurveyor neglects to warn out or to make preſentment of neglects he ſhall incur a like forfeiture. The ſurveyors have power to clear water courſes through lands adjoining to highways, for the purpoſe of draining off water from highways. Many towns have obtained the privilege of repairing their highways by taxes: in which caſes they lay taxes in town meetings and the ſurveyors are alſo collectors, and either collect the money, and lay it out in repairing the highway, or oblige every perſon to labour to the amount of his taxes.

6. Liſters conſiſt of ſuch number, as the town think proper to appoint, and are to be ſworn. In July annually it is their duty to notify the inhabitants to bring in liſts of the eſtate they own on the twentieth of Auguſt by the tenth of September, who on failure, are liable to be fourfolded. The liſters are to tranſmit the ſum total of the liſts to the general aſſembly in October, on penalty of

ten

ten pounds to the ſtate treaſury: and all additions in May, when the grand liſt of the ſtate is compleated, on which the public rates are laid. The liſters are to lodge the liſts of the town with the town clerk in January, on penalty of ten pounds to the town. And if no return be made to the general aſſembly, the town may be doomed at the diſcretion of the aſſembly.

If the liſters overcharge any perſon, he may before the 20th of April following, make application to two juſtices, and three ſelectmen, who may grant him relief.

The liſt is made out by ſpecific rates at which the polls, and eſtate, both real and perſonal, of the inhabitants are liable to be ſet, and by diſcretionary aſſeſſments of the liſters on certain profeſſions of buſineſs. An equal mode of taxation, is the great deſideratum in government, as all ought equally to contribute to the ſupport of that government that affords them protection. Many have been the efforts in this ſtate, to accompliſh this plan, and various are the ſchemes, that have been devited, but none has been yet adopted that gives univerſal ſatisfaction. It is probable on a full inveſtigation of this ſubject, it will be found impoſſible to frame a mode that in its immediate operation, will compel every member of the community to contribute to the ſupport of it according to the value of his eſtate, and it will be found to be a matter of certainty, that after a mode of taxation is adopted, the courſe of things will vary the value of eſtate, and the price of ſervice, in the profeſſions that are aſſeſſed, ſo as very nearly to proportion the taxes equally among the people. Upon this principle then it is adviſeable to eſtabliſh a mode of taxation as general as poſſible and on ſuch articles about which there can be the leaſt deception, and leave it to the operation of things to produce an equality. Frequent changes of the mode will only retard this operation.

But it is hoped that the ſtate will ſo manage their finances as not to have occaſion, to reſort to direct taxation, as a ſyſtem of revenue. It is wonderful to obſerve, with how much greater facility money can be drawn from the people, by indirect, than by direct taxation. The immenſe ſums paid in Great-Britain, if collected by a direct tax, would very ſoon bankrupt the nation.—

The ſum paid by the State of Connecticut to the United States, exceeds probably half a million of dollars annually. This would be a tax not far from two ſhillings on the pound. It would not be practicable to collect this ſum by the direct mode, by which the revenue of the ſtate is collected; but by the indirect mode adopted by congreſs, the money is collected, and the people feel from it no burden or oppreſſion, and are not deprived of a ſingle enjoyment. The tax works itſelf into the price of the articles conſumed, and from time to time it is gradually and imperceptibly paid in ſmall ſums, without any inconvenience to the conſumer.

7. Collectors of town taxes. Towns have a right to appoint collectors to collect ſuch taxes as they grant, to defray the neceſſary expenſes of the town. A proper rate bill muſt be made containing the ſums due from each perſon, and an aſſiſtant, or juſtice of the peace, can grant a warrant to collect them. The collector has the ſame power in the collection of the rates, as the ſheriff has in the collection of an execution. When they neglect their duty, and fail to make payment, the ſelectmen on application to an aſſiſtant or juſtice of the peace, may obtain a warrant againſt them, for the ſum in arrear, which may be collected out of their own eſtates.

8. Grandjurors are officers appointed to make information of all crimes, that are committed, and for neglect of preſenting any breach of law, of which they have knowledge, ſhall pay a fine to the town treaſury. If any town neglect to make choice of grandjurors, they incur a penalty of five pounds to the county treaſury.

9. Sealers of weights and meaſures, are to ſeal all the weights and meaſures that are uſed in the town, and no perſon ſhall uſe any weights and meaſures, that are not proved by the ſtandard, under a penalty of five ſhillings, payable to the town treaſury.

In addition to theſe officers, there are leather-ſealers, tythingmen, haywards, chimney viewers, gaugers, packers, and keykeepers, whoſe duty is of a nature, that it cannot be expected to be detailed in a general treatiſe.

All perſons duly elected to any town office, that refuſe to ſerve or take the oath (if any be required,) if able to execute the office, ſhall pay a fine of twenty-ſix ſhillings to the town treaſurer. If any officer neglects the performance of the truſt committed to him, he ſhall pay a fine of fifteen ſhillings. If by refuſal, death, or removal, there be a vacancy of any town offices, the town may convene, and fill the vacancy.

Chapter Seventh.

OF SOCIETIES AND THEIR OFFICERS.

IN handling this ſubject, I propoſe to conſider the eccleſiaſtical conſtitution of this ſtate.

A remarkable difference is obſervable between ancient and modern times, reſpecting religion. [b] The pagan nations univerſally adopted polytheiſm, which admitting the idea of national gods, excluded the principles of intolerance, and the cruelties of perſecution. [c] The Grecians and the Romans, veſted the power of preſiding in religious ceremonies, in the civil magiſtrate, and the ſame perſon inſpected the entrails of the victims, and guided the councils of the nation. There was no diſtinction of clergy and laity. There were no prieſts to poſſeſs excluſive rights and temporal power, by which a particular order in the ſtate, could be aggrandized, but the union of both powers in the magiſtrate, rendered religion ſubſervient to the peace of government and the welfare of the people. The tolerant polytheiſt, beheld however, with indignation, the unſocial worſhip of the deſcendants of Abraham, who made it their glory, that they were the peculiar favourites and choſen race of a God, who was infinitely, ſuperior to the gods of their neighbours. [d] But when the diſciples of Jeſus, emerged from the land of Judea, pronounced the gods of the conquerors of the world, to be falſe gods, and condemned their rights and ceremonies which had grown venerable by time, the tolerant hand of polytheiſm, was provoked to puniſh them, not for the errors of their religion, but for their obſtinate contempt of the religion of the empire. Had they acknowledged the deities of their ſovereign,

b Gillies Hiſt. Greece, vol. i. chap. i. Ferguſon's Hiſt. Rome, vol. i. chap. i. c Gibbon's Hiſt. Rom. Empire. d Hume's Hiſt. N.t. Relig.

and claimed for their ſaviour, the common privilege of a national god, without doubt, Jeſus would have been permitted to have taken a ſeat in the heavenly council on Olympus, in company with Jupiter and Juno, Mars and Venus. [e] But to dethrone the father of gods, and king of men, with the [f] thirty thouſand ſubordinate deities, that preſided over every department of nature, and on their ruins to elevate a crucified God, was deemed an act of impiety, that called for the higheſt indignation and juſtified the ſevereſt puniſhment.

When the ſuperior beauty and excellence of chriſtianity, diſſolved the baſeleſs fabric of pagan ſuperſtition, and brightened with new born luſtre, the imperial purple of Conſtantine, it was thought neceſſary and proper, that the holy rights and ordinances, ſhould be adminiſtered by hands ſet apart, and conſecrated to that pious office. Hence aroſe a new order of men, and the eccleſiaſtical hierarchy was eſtabliſhed.

Sundry cauſes co-operated to give the chriſtian clergy, a power unknown to the pagan prieſthood. The removal of the ſeat of empire from Rome, gave the biſhop of that city, which having ſo long been the capital and miſtreſs of the world, had acquired the reſpect and veneration of all nations, an opportunity to obtain an aſcendancy and influence over the other churhes, without the preſence of a ſovereign, to check the progreſs of their deſigns, or eclipſe the pomp and ſplendor of eccleſiaſtical dignity, Had Rome been honored by the imperial reſidence, it is beyond a doubt, that the Roman pontiff had never acquired a greater ſhare of temporal authority, than the patriarch of Conſtantinople.

[g] The northern nations who conquered and ſettled the provinces of the weſtern empire, had been accuſtomed to yield the blindeſt ſubmiſſion, and moſt ſervile obedience to their prieſts. The druids, who performed the moſt ſolemn rites, and awful ceremonies in the deep receſſes of the wide extended foreſts of Germany, were

[e] When Jove convened the ſenate of the ſkies,
Where high Olympus cloudy tops ariſe,
The Sire of Gods—— Hom. Iliad. viii. 3.

Panditur interea domus omnipotentis olympi,
Conciliumque vocat, divum pater, atque hominum rex,
Sideream in ſedem. Virg. Æneis l. x. 1.

[f] Heſiod oper et Dier. l. i. 250.

[g] Cæſar de bells Gallico. L. V. C. 13. Tacitus de mor. German. C. VII. Moſheim's Eccl. Hiſt. Vol. II. 59.

were held by thoſe heroic warriors, in higher eſtimation than their leaders, and governed them in peace and war with abſolute ſway. On their converſion to chriſtianity, they conferred on the chriſtian prieſthood, the authority of the druids, and the biſhop of Rome became the arch-druid of the chriſtian world. To the ſimplicity of this religion, they annexed the magnificient rites of paganiſm, and a pure religion that was calculated for the poor, the meek, and the humble, whoſe precepts were to deſpiſe the world; to mortify the deſires of the fleſh, and the pride of the heart, underwent a transformation, by which the prieſthood gained thoſe periſhing riches, and indulged in thoſe ſenſual pleaſures, which they affected to contemn, and the ſucceſſors of a fiſherman were inveſted with the higheſt dignity, and aſſumed the greateſt pomp and ſplendor that ever were beſtowed on worms of the duſt. The popes, on the maxim, that all things were lawful for the ſaints, in purſuing the glory of God, took advantage of the weakneſs, the folly, and the ignorance of mankind, and practiſed pious frauds, and holy forgeries, to eſtabliſh that ſupreme power, which they ſo ardently deſired, and againſt which they pretended to have the authority of ſcripture, that *the gates of hell ſhould never prevail.* The pretended gift of Conſtantine, of the city of Rome, and the actual donation of extenſive territory by Pepin and Charlemagne, gave them a temporal power by which they greatly augmented their ſpiritual influence. They obtained an abſolute authority over the opinions of mankind, and exerciſed over them, a more extenſive and diſpotic rule, than ever was eſtabliſhed by the arms of a conqueror.—Seated at the head of the church militant, and veſted with the high privilege of infallibility in matters of religion, they fulminated their bulls, againſt all who oppoſed their ſupremacy. The potent ſound of their voice, hurled emperors and kings from their thrones, and abſolved their ſubjects from the oath of allegiance. They gave away the kingdoms of thoſe princes who continued refractory, and trod on the necks of thoſe who humbled themſelves before them. The greateſt potentates, deemed themſelves honored to kiſs the toe of the ſucceſſor of ſaint Peter, and the vicegerent of God.

As eccleſiaſtical deſpotiſm, was founded on mere opinion, a uni-

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formity of religion became neceſſary to ſupport it, and the popes exerted all their power to accompliſh their favourite plan. As the clergy had ſuch an irreſiſtible controul over the minds of the people, it became neceſſary for kings, to admit ſuch political eſtabliſhments of religion, as they dictated, and to become the inſtruments of ſupporting and extending their influence, for the purpoſe of obtaining it to ſtrengthen the arm of the civil magiſtrate. In this manner were introduced thoſe two leading doctrines, in the politics of the dark ages,—the neceſſity of civil eſtabliſhments of religion, and of uniformity of opinion in articles of faith, to maintain the authority of the church, and the power of government. The clergy uſurped an uncontrouled authority in all matters, which they pretended, were of an eccleſiaſtical nature. They ſeparated themſelves from the civil ſtate, they became a diſtinct order of men, devoted to the ſole employment of religion, and forever ready to interrupt the tranquility, or impede the adminiſtration of government, when they thought it neceſſary to guard, or extend the rights of the church. Hence originated a government within a government, and a ſeparation of intereſt between the clergy and laity, which produced perpetual diſcord and contention. The right of eſtabliſhing uniformity in religious opinions, juſtified the majority, who aſſumed the ſtile of orthodox, in puniſhing the minority, whom they branded with the infamous name of heretics. This gave birth to the abominable practice of perſecution, which theſe unfeeling tyrants reduced to ſyſtem. The inquiſition was inſtituted for the diſcovery and trial of heretics. [a] The wretched victims of ſpiritual jealouſy, were ſtretched on the rack, to be tortured into a confeſſion of crimes, of which they were innocent. When convicted by a mode of trial, which gave guilt and innocence equal chances to be acquitted, their excruciating agony, and intolerable diſtreſs, amid conſuming flames, furniſhed a delightful ſpectacle to their cruel perſecutors, who impiouſly pretended, that the God of mercy, and the father of mankind, would ſmell a ſweet ſavour from ſuch bloody and inhuman ſacrifices.

When

[a] In 1680 Charles II king of Spain, honoured by his royal preſence, an auto da fe, the burning of an heretic, condemned by the inquiſition——So late as 1781, the holy inquiſition, condemned to death, a woman for witchcraft and ſorcery, and ſhe was burned purſuant to the ſentence.
Bourgoanne's Travels in Spain, vol. i. 160. 173.

When the profeſſors of the pure religion of the humble Jeſus, had commenced a traffic in the ſins and wickedneſs of mankind, and the corruption of the church of Rome, had become ſo enormous, as to call aloud for reformation, the bold hand of Luther, and the reformers, rent aſunder the veil that had concealed the miſteries of papal iniquity for ages, and expoſed to view the impurities and abſurdities of the Romiſh religion. Yet the reformers never diſcovered the genuine principles of religious liberty. They did not deny the exiſtence of a right, in the true diſciples of Chriſt, to puniſh with temporal pains, and penalties thoſe perſons whom they deemed to be heretics. They cenſured the church of Rome, not becauſe they perſecuted, but becauſe they perſecuted the faithful ſervants of God. In every inſtance where they had power, they perſecuted thoſe whom they conſidered to be heretics. ; The barbarous perſecution and cruel death of the learned and virtuous Servetus, which was procured by Calvin, in violation of every principle of juſtice and humanity, has ſtained with indelible infamy the character of that celebrated reformer.

When the Engliſh nation threw off the papal yoke, they veſted in their ſovereign, the power of ſupreme head of the church. They retained the doctrine of the neceſſity of religious uniformity, and eccleſiaſtical eſtabliſhments, for the preſervation of church and ſtate. The act of uniformity that was paſſed in the commencement of the reign of the celebrated queen Elizabeth, eſtabliſhed the rites and ceremonies of the church of England, and inflicted ſevere puniſhments on all diſſenters. Thus the right of perſecution was aſſerted, and the power enforced by an act of parliament, and during the reign of this queen and her ſucceſſor, the unfortunate puritans experienced its dreadful conſequences. They were puniſhed for non-conformity to the eſtabliſhed church, which they deemed idolatrous and heretical. They were prohibited from aſſembling for the purpoſe of conducting public worſhip, according to the dictates of their own conſciences. Whole families were ruined by fines and impriſonments, and many learned, pious, and exemplary preachers ſuffered the puniſhment of death by the hand of the common executioner. The indefatigable zeal with which the clergy executed thoſe barbarous laws, rendered the ſituation of the diſ-

ſenters

Voltaire's un. hiſt. vol. ii 312.

ſenters wretched and deplorable, and led them to ſeek a country, where they could enjoy liberty of conſcience, uninterrupted by the haughty domination of a prieſthood, and the unrelenting fury of perſecution. The wilds of America opened to them the proſpect of an happy aſylum, for the fruition of this ineſtimable bleſſing. Animated with this ſentiment, ſome of the independents, a ſect of diſſenting chriſtians, abandoned their native country, and embarked in an enterpriſe replete with danger, hazard, and uncertainty. Perſecution in this manner originated and accelerated the ſettlement of North-America, the only good effect it ever produced.

Eſcaped from the ſeverity and rigor of the eccleſiaſtical eſtabliſhment in England, when they came to form their ſyſtem for the government of church and ſtate, the miniſters and the people viewed each other with a jealous eye. They exerciſed the greateſt caution, to avoid every thing that ſhould expoſe them to ſuffer a repetition of thoſe intolerable misfortunes, which had juſt baniſhed them from their native land. The people were extremely careful not to truſt in the hands of their miniſters any temporal power, that could be exerted to the prejudice of their privileges, as citizens. The clergy having in their native country experienced the oppreſſion of the civil arm, were equally cautious to guard againſt a power by which their immunities could be infringed. This mutual jealouſy had the beneficial effect, to induce them to adopt a more mild and tolerant eſtabliſhment, than that with which they had been acquainted. But even at this time, their misfortunes and their ſufferings had not taught them the genuine principles of religious liberty. They ſtill adopted the political error, that religion could not exiſt without uniformity of ſentiment, and government without an eccleſiaſtical eſtabliſhment. They therefore recognized the right of the true church to puniſh heretics, and enacted laws for that purpoſe. But the puniſhments grew mild in proportion to the progreſs of humane and benevolent ſentiments. The happy æra had not yet arrived, when theſe deſtructive principles ſhould be exploded, and theſe barbarous inſtitutions aboliſhed.

[k] In the firſt ſettlement of Connecticut, the legiſlature adopted an eccleſiaſtical conſtitution of the following form. No perſons could embody

[k] Ancient Statutes of Connecticut reviſed in 1672 and publiſhed at Cambridge in 1673. 21.

embody themſelves into a church, without the conſent of the general court, and the approbation of neighbouring churches. No miniſtry, or church adminiſtration could be attended upon, by any of the inhabitants, diſtinct from, and in oppoſition to that which was diſpenſed by the approved miniſter of the place, without the approbation of the general court, and neighbouring churches, on penalty of five pounds. They expreſſed their apprehenſion of danger, from the diviſions reſpecting church-government, yet from tenderneſs to the conſciences of thoſe, who differed in ſentiment, they declared, that as the congregational churches in profeſſion and practice, had been approved of, they would countenance the ſame, and protect them from diſturbance till better light ſhould appear; yet as there were ſundry perſons of prudence and piety of different ſentiment, whom they wiſhed to accommodate, they ordered that all ſuch perſons, being approved of according to law, as orthodox, and ſound in the fundamentals of the chriſtian religion, ſhould have allowance in their perſuaſion, and profeſſion, in church ways or aſſemblies, without diſturbance. They enacted laws to puniſh perſons guilty of reviling the preached word, interrupting or diſturbing the preacher, or abſenting themſelves from public worſhip. For the purpoſe of maintaining the peace, and proſperity of the churches, as well as the rights and liberties of the people, they declared that the civil ſtate had power and authority to ſee that the peace ordinances and rules of Chriſt, be obſerved in every church, according to his word, and to deal with any church member, in a way of civil juſtice, and not in an eccleſiaſtical way, and that no church cenſure ſhould degrade, or depoſe any man from any civil dignity, office, or authority. They ordered the ſocieties to make proviſion for the ſupport of the miniſters, and on failure, enabled the county courts to make proviſion. They were ſo fully convinced of the truth of their own creed, and of the right of puniſhing hereſy, that they [l] enacted that all perſons who ſhould unneceſſarily entertain any quaker, ranter or Adamite, or other notorious heretic, ſhould forfeit five pounds, and the like penalty per week was inflicted on towns, that ſhould ſuffer ſuch entertainment; that no perſon ſhould unneceſſarily fall into diſcourſe with them, on penalty of twenty ſhillings. The governor, deputy-governor, or aſſiſtants,

[l] Ancient ſtatutes 28,

were impowered to commit them to priſon, or ſend them out of the colony. The maſters of veſſels who imported them, were obliged to export them on penalty of twenty pounds. Such were the outlines of their eccleſiaſtical eſtabliſhment. No rules of church diſcipline, or articles of faith were eſtabliſhed: but the clergy were left to their own diſcretion. No teſt acts were paſſed, which excluded any denomination whatever, from holding offices in government.

In the year 1706, the law againſt heretics, as far as it reſpected quakers, was repealed. In 1708, a law was paſſed, declaring that all perſons who ſoberly diſſented from the worſhip and miniſtry by law eſtabliſhed, might at the county court in the county where they belonged, qualify themſelves according to an act of parliament, paſſed in the firſt year of the reign of William and Mary, and enjoy the ſame liberty of conſcience as diſſenters enjoyed in England. The act of William and Mary, exempted proteſtant diſſenters from the penalties incurred by non-conformity, upon their taking the oath of allegiance, and ſupremacy, ſubſcribing the declaration againſt popery, and repairing to ſome congregation regiſtered in the biſhop's court, or at the ſeſſions. This act furniſhed a very imperfect toleration. It only exempted them from puniſhment for non-conformity, but left them obliged to pay tithes, which is a moſt intolerable burden on the whole community, without acquiring equal privileges, with the reſt of their fellow-citizens. But even this partial privilege was obtained with great difficulty. At the revolution, the deſpotiſm of James II. the eloquence of Locke, [m] and the liberality of William III. convinced the parliament of the propriety of relaxing from the rigor of the act of uniformity, and of excuſing from puniſhment their chriſtian brethren, who were guilty of no other crime, but a difference of ſentiment in the immaterial points of religion. This produced the before-mentioned ſtatute, which is called the act of toleration. It was very natural, that the aſſembly of Connecticut, ſhould imitate the practice and adopt the improvements of the mother country, and this undoubtedly gave birth to the ſtatute of toleration paſſed in 1708, in favor of the diſſenters in this country. They were however, ſtill ſubjected to pay to the maintenance of the ſtanding miniſtry. This ſtatute anſwered

[m] Locke on toleration.

anſwered another excellent purpoſe, for it virtually tho not expreſsly repealed the law againſt heretics, which might then have been conſidered a great improvement in civil policy. Strange that mankind ſhould generally derive greater benefit, from repealing laws, than enacting them: but in modern times, it is certainly a truth, that the happineſs of the people has been more augmented by the repealing of laws that contravened the public good, than by any new regulations that have been deviſed.

In the year 1708, the general aſſembly expreſſed their approbation of the confeſſion of faith, heads of agreement, and regulation of the adminiſtration of church diſcipline, agreed upon by the eccleſiaſtical ſynod held at Say-Brook, and ordained that all the churches thus united in doctrine, worſhip and diſcipline, ſhould be owned and acknowledged to be eſtabliſhed by law; with a proviſion that nothing ſhould be conſtrued to prevent a ſociety or a church ſoberly diſſenting from the eſtabliſhed churches, and allowed by law, from exerciſing worſhip, and diſcipline, in their own way, according to their conſciences. This law, is the foundation of all the eccleſiaſtical conſtitution that has exiſted in this ſtate. A ſect of chriſtians, conforming to the creed and church government, adopted by the ſynod of Say-Brook, was eſtabliſhed. At this time, all the people whether they diſſented or not, were bound by law to contribute towards the ſupport of this miniſtry: but thoſe, who conformed to the ſtatute of toleration, were in every other reſpect independent of them.

But the government notwithſtanding their tolerant principles, would not ſuffer any religious aſſemblies, unleſs conformable to the eſtabliſhment or the ſtatute of toleration. In the year 1723, they complain, that ſome perſons without qualifying themſelves according to law, for the enjoyment of liberty of conſcience, preſumed to form ſeparate meetings, and that ſome adminiſtered the ſacraments without ordination, they therefore paſſed a law, that all perſons who neglected public worſhip in ſome lawful congregation, and preſumed to meet in ſeparate companies in private houſes, ſhould be puniſhed with a fine of twenty ſhillings, and that every perſon not being a lawful or ordained miniſter, who adminiſtered the ſacraments, ſhould incur a penalty of twenty pounds. This law was

well calculated to excite tumult and promote diſſention, but was neceſſary to preſerve the eſtabliſhment. When a government once makes an encroachment upon the natural rights of the people in one reſpect, they are obliged to do it in many others, for the purpoſe of ſecuring the object in contemplation.

As ſoon as the principles of toleration were called into exerciſe other improvements were naturally ſuggeſted to the legiſlature. It ſoon was diſcovered to be contrary to the principles of religion, as well as juſtice, that a ſect of chriſtians who were tolerated and protected by law ſhould contribute to the the ſupport of the miniſtry of another ſect, whoſe difference of opinion prevented them from uniting together in public worſhip. In 1727, the profeſſors of the church of England, made application to the aſſembly, ſtating that they were under obligations to ſupport public worſhip according to the church of England, that diſſenters had always eſteemed it a hardſhip in England, to be compelled to contribute to the ſupport of that church, praying that they might be exempted from ſuch a hardſhip. This application was powerfully enforced by the conſideration, that the applicants belonged to the church, which was eſtabliſhed and protected by that government, to which Connecticut owed allegiance, and that there was danger, that force would be exerted to extort the privilege demanded, in caſe of refuſal.—This accidental circumſtance, produced this exemption, at a much earlier period, than it would have happened, if the ſame religious ſect had governed in England and Connecticut. An act was paſſed, directing that the money collected of epiſcopalians, by taxes laid on the ſocities, ſhould be paid to the epiſcopal miniſters, in caſe there were any ſettled according to the cannons of that church on whom ſuch perſons attended, and if the money ſo collected was inſufficient, to ſupport the miniſter, the epiſcopalians, might tax themſelves for that purpoſe, and they were exempted from paying taxes to build meeting houſes.

When fear and policy had introduced the exemption of the epiſcopal church, from contributing to the ſupport of the eſtabliſhed order, the precedent ſanctioned the claims of every other denomination of diſſenters. In 1729, the ſame privilege was granted to quakers, upon their attending the worſhip of God, in ſome ſociety,

allowed

allowed by the ſtatute of toleration, either in the government, or on the borders thereof, if ſo ſituated that they could attend therein; and producing a certificate that they had joined, and belonged to ſuch ſociety. In the ſame year the baptiſts on petition obtained the ſame privilege and exemption.

At this period the doctrine, that uniformity of religion was neceſſary to the exiſtence of church or ſtate was exploded, and one of the great ſources of human calamity was dried up. At the ſame period was interwoven into the eccleſiaſtical conſtitution, the principle that the legiſlature had a right to interfere and diſcharge diſſenters from any obligation to maintain the miniſters of the ſtanding church. The agreement of ſettling a miniſter, tho binding on the ſociety, is merely a corporate or political tranſaction, and by no means involves a perſonal obligation upon the honor and conſciences of men, like a private contract, becauſe the majority governs, and a man may be legally ſubjected to a contract to which he never aſſented. The law was paſſed for the purpoſe of promoting the public good, and whenever an alteration became neceſſary for the ſame purpoſe, there muſt be an inherent right in the legiſlature, to make the alteration. It would be the higheſt abſurdity to pretend that when the legiſlature had once adopted a regulation, they could not vary it according to the varying circumſtances of the people. The ſettlement of miniſters is merely a civil regulation, and in that point of view muſt be always under the power and controul of the legiſlature. This power has not only been poſſeſſed, but has in fact always been exerciſed by the legiſlature, and there is no contract of ſettlement, with any miniſter, but that was made at a time, when the parties concerned knew of the exiſtence of ſuch a power: In reſpect of the contracts now in being, the exemption of diſſenters cannot be conſidered as an ex poſt facto law; for prior to the exiſtence of any contract, by which any miniſter now claims his ſalary, the law had given them the privilege of diſcharging themſelves in their individual capacity. Every miniſter muſt have known at the time of his ſettlement, that the individuals of the ſociety, have a power to avoid the contract, as it reſpects them perſonally, ſo that while they have a challenge upon the ſociety, as a political body, the members are excuſed from paying in their private capacity. In this

manner

manner every member, by lodging a certificate, may excuſe himſelf from the ſupport of the miniſter, and withdraw from the ſociety; by which the ſociety undergoes a total transformation, and a new one riſes out of the ruins of the old, diſcharged from the contract to pay the ſalary of the miniſter. The original ſociety as it reſpects ſchools, continues in exiſtence; but as relative to the ſupport of public worſhip, it is diſſolved, and of courſe the contract by the operation of a law in being when it was entered into by the miniſter and people, is annulled, and at an end. The late acts of the legiſlature, reſpecting diſſenters, cannot be ſaid to be ex poſt facto laws, authoriſing a breach of contract, and deſtroying the faith of government. They are only the exerciſe of that power which the legiſlature has always exerciſed in altering and explaining the mode by which diſſenters may attain that privilege, which had long before been granted to them, and to which they have been forever entitled by the laws of nature, and the principles of juſtice. It may therefore be laid down as a poſition founded in truth, that the power of exempting by an act of the legiſlature, a perſon that becomes a diſſenter, from a corporate contract, has ever been a part of the eccleſiaſtical conſtitution, and that the right of individuals to this exemption, is derived from that eternal bill of rights that originated from the fitneſs of things, and exiſted prior to, and is independent of all human regulations.

But the moſt glorious improvement in the eccleſiaſtical conſtituti on was reſerved for the æra of the American revolution. In the reviſion of the laws in 1784, the eſtabliſhment of the church diſcipline and government agreed upon by the ſynod of Say-Brook was omitted, and liberty of conſcience granted to chriſtians of every denomination. Tho perhaps the legiſlature had it not in contemplation, yet here is a compleat renunciation of the doctrine, that an eccleſiaſtical eſtabliſhment is neceſſary to the ſupport of civil government. No ſect is inveſted with privileges ſuperior to another. No creed is eſtabliſhed, and no teſt act excludes any perſon from holding any offices in government. The leading principle of the conſtitution is founded on the acknowledged truth, that the ſublime morality of the chriſtian religion, is calculated to make men good citizens, and that the beneficial effects of it will be moſt apparent,

where

where it is leaſt ſhackled with human laws. The regulations therefore grant to every perſon, the full liberty to adopt ſuch creed as he pleaſes, and ſecure to every denomination, the power, and privilege of worſhipping according to the dictates of their conſciences. Thus we derive from the voluntary profeſſion of religion, all the benefit of an eccleſiaſtical eſtabliſhment, without the inconveniencies. Such is the hiſtory of the progreſs and gradual improvement of our eccleſiaſtical conſtitution. A conciſe view of the preſent ſtate of it, will cloſe this ſubject.

n The ſtate is divided into certain diſtricts, called ſocieties, which have the power of aſſembling, of holding annual meetings, of appointing a clerk, treaſurer and committee, of laying taxes, and appointing a collector to collect them. The major part of the inhabitants of a ſociety have power to call and ſettle a miniſter, and make agreements with him reſpecting his ſalary, which ſhall be binding on the whole, and their ſucceſſors. They are to lay taxes annually for the ſupport of the goſpel miniſtry, and can appoint collectors, and enforce the collection. If the allowance for the maintenance of a miniſter, be too ſcanty, on application, the general aſſembly may grant relief, and where the preaching of the goſpel is neglected for a year or years, the general aſſembly may grant a tax, and when collected, the county court may diſpoſe of it for the uſe of the miniſtry in the ſociety. Such are the powers veſted in the located ſocieties. o To prevent them from tyrannizing over the conſciences or the property of any of the people, the law has provided that every denomination of chriſtians, who differ from the worſhip and miniſtry adopted by the major part of the inhabitants of the located ſocieties, may form themſelves into diſtinct churches or congregations for public worſhip, in ſuch manner as they may judge proper, and that all perſons who attend ſuch churches or congregations may give under their hand, a certificate of their diſſent, and lodge the ſame with the clerk of the located ſocieties, and become wholly independent of them, and are to all intents and purpoſes, legal corporations—for the law provides, that all ſuch churches and congregations which have or ſhall form themſelves as aforeſaid, and who ſhall maintain and attend public worſhip by themſelves, ſhall have liberty and authority

n Statutes, 235. o Ibid. 416.

rity to exercise the same powers, for maintaining and supporting their respective ministers, and for building and repairing meeting houses for the public worship of God, as the other societies, and may in the same manner commence and hold their meeting, and transact their affairs.

This is levelling all distinctions and placing every denomination of christians equally under the protection of the law.† Indeed the people are left to their own freedom, in the choice of their creed, and mode of worship. The major part of the inhabitants of the located societies, possess the same privilege. Before the revision of the laws in 1784, while the church discipline adopted by the synod of Say-Brook, was in force, they were legally compellable to support the gospel, in that manner: and since that time, they have by common consent recognized the authority of that synod, and made their acts the basis of ecclesiastical government; but as this has no legal force, they may adopt or refuse it as they please; and may form any other rules of discipline, according to their own sentiments. In consequence of this a perpetual variation of religion may take place, without any interruption from civil regulations, and

† I have ventured to say that all denominations of christians are placed on a footing by law, because I consider they are so in effect, tho a little distinction is kept up, between the located and dissenting societies. The located societies have a right to tax all within their limits, who do not lodge certificates agreeable to law. The lodging of certificates by the dissenters, has been deemed by some a mark of degradation, but this idea may be removed when it is considered that it is not an act acknowledging any superiority in the located societies, it is nothing more than an act in the dissenter, to inform the located society, that he does not belong to them. It is only a legal mode of evidence to ascertain to what society the people belong. It is a part of the acts necessary to be done, to constitute a new society; and when a number of persons, who dissent from the located society, have entered into a mutual agreement, established public worship, and lodged their certificates, they are during the continuance thereof, a compleat, legal, corporation, and are precisely on the same basis with all other societies, without being amenable to them in any respect. As the located societies were first established, and are the most numerous, it was reasonable that dissenters who formed new societies, should lodge certificates with them.

Another difference is, that where a person attends on public worship in no religious society, he shall be taxed in the located societies. Such person ought to be taxed some where, and as dissenters, can have no claim upon persons, who do not join them, there is no injustice done them, by permitting persons who belong no where to be taxed where it will be most convenient: for it would be difficult for dissenters to adopt a mode to ascertain such persons, while the located societies, can do it with the utmost facility.

When I use the word dissenters, it is only for the sake of distinction, for I consider the inhabitants of the located societies, to be as much dissenters from other societies, as I do them from the located societies.

and chriſtianity in every poſſible ſhape, is ſo far countenanced as to give the profeſſors an undiſturbed enjoyment of their own opinions. It is very poſſible, that the ſect in the located ſocieties, which have conſidered themſelves eſtabliſhed, may ceaſe to be the major part, and become the minor, and be obliged to give certificates to them whom they now call diſſenters. This opens the door for the progreſſive improvement of religion unſhackled by human laws. Many of the abſurd and irrational doctrines which have ſo long diſfigured and diſgraced chriſtianity, are already exploded, and there is a proſpect that many more will ſoon meet with the ſame fate. Mankind are rejecting thoſe falſe appendages of religion, which have ſo long impoſed upon them penances and reſtraints, that have only contributed to encreaſe their wretchedneſs and miſery. They begin to entertain an idea, that religion was not inſtituted for the purpoſe of rendering them miſerable, but happy, and that the innocent enjoyments of life, are not repugnant to the will of a benevolent God. They believe there is more merit in acting right, than in thinking right; and that the condition of men in a future ſtate, will not be dependent on the ſpeculative opinions, they may have adopted in the preſent.

It is a pleaſing conſideration, that pure religion and moral virtue, have augmented in proportion to the progreſs of liberality of ſentiment, and that every relaxation of the ſeverity of the eccleſiaſtical eſtabliſhment, has contributed to the ſtability of government, and the happineſs of the people, There are many who having in early youth, imbibed the falſe principle that government cannot exiſt without a civil eſtabliſhment of religion, are now unwilling to reſcind it: but a contemplation of this ſubject, muſt furniſh the cleareſt demonſtration. It will be found in all countries that eccleſiaſtical eſtabliſhments have ſubjected mankind to a deſpotiſm that has largely contributed to their diſtreſs, and that human happineſs has been proportioned to religious liberty. In this ſtate, ſince the rejection of our eccleſiaſtical eſtabliſhment, religion has become more flouriſhing, government more energetic, and the people more peaceable. Theſe conſiderations muſt demonſtrate the important truth, that a religious eſtabliſhment is not neceſſary to the ſupport of civil government, and that religion left to itſelf, will produce the happieſt influence on civil ſociety.

A queſtion of importance has been frequently agitated with reſpect to the right of government, to interfere in the concerns of religion. I am clearly of opinion that no legiſlature has a right to preſcribe the ceremonies, the creed or the diſcipline of a church: but that where the people in general acknowledge the truth of a particular religion, and the duty of public worſhip, the legiſlature may ſtep in to their aid, and enact laws that are neceſſary to enable them to ſupport public worſhip in a manner agreeable to their conſciences. In this ſtate, the people in general recognize the truth of the chriſtian religion, and the duty of public worſhip. The legiſlature without eſtabliſhing any religion, has conſidered chriſtianity to be the religion of the people, and has enacted laws to authoriſe the people to maintain public worſhip, in the manner which they deem proper. No mode of worſhip is preſcribed, no creed is eſtabliſhed, no church diſcipline enforced. In point of principle there is no coercion. In point of ſupport there is no compulſion, only in ſuch manner as by their own acts, all have acknowledged to be right, and to which they have agreed to ſubmit. A Jew, a Mehometan, or a Bramin, may practice all the rites and ceremonies of their religion, without interruption, or danger of incurring any puniſhment. A fair conſtruction of the law will give to every perſon that religious liberty, which leaves no ground for complaint or diſſatisfaction. Every chriſtian may believe, worſhip, and ſupport in ſuch manner as he thinks right, and if he does not feel diſpoſed to join public worſhip, he may ſtay at home and believe as he pleaſes, without any inconvenience, but the payment of his tax to ſupport public worſhip in the located ſociety where he lives.

The only ground of diſpute between different denominations, is with regard to the conſtruction of the ſtatute, ſecuring the rights of conſcience. Heretofore, diſſenters, as it was always in the power of the inhabitants of the located ſocieties, to try the legality of their certificates of diſſent, have been ſubjected to hard and rigourous uſage. Courts and juries have uſually been compoſed of what was conſidered the ſtanding church, and they have frequently practiſed ſuch quibbles and fineſſe with reſpect to the forms of certifi-

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cates, and the nature of diſſenting congregations, as to defeat the benevolent intentions of the law. Such an illiberal prejudice is manifeſtly repugnant to the genuine ſpirit of chriſtianity. Chriſtians ought to attend to two conſiderations, which are of great importance as relative to the peace of ſociety. In all inſtances where a diſſenter claims to be exempted from paying taxes to the ſupport of the miniſtry in the located ſocietes, by virtue of the ſtatute, and the queſtion is brought to trial before a court of law, the triers ſhould be extremely careful to ſtrip themſelves of all that prejudice which different ſects are too apt to feel towards each other, they ſhould judge upon the moſt enlarged principles of charity, and give the law the moſt candid and liberal conſtruction. For nothing is more diſgraceful, than for one ſect to draw the ſupport of its miniſtry from another. The very ſemblance of perſecution ſhould be avoided.

On the other hand, chriſtians ought not to ſeparate from each other on ſlight grounds. There can be no impropriety in their uniting together in the public worſhip and adoration of the common Father of all men, tho they ſhould entertain a great diverſity of religious ſentiments. There can be no neceſſity, that all the members of the congregation ſhould believe alike to render worſhip ſincere. Each will believe and worſhip for himſelf, and their union in the act of devotion will be acceptable to God, tho there be as many different opinions as there are members of the congregation. For near eighteen centuries, the different ſects of chriſtians have been quarreling with each other, reſpecting a religion which recommends, brotherly love, as the moſt eſſential duty. It is time that they began to practice the religion they profeſs. They ought to know, that no one can have any occaſion to quarrel about it, becauſe every one has a right to think as he pleaſes. May we not hope, that the period is not far diſtant, when mankind will have ſenſe enough to diſcern the extreme folly of a religious quarrel.

CHAPTER EIGHTH.

OF SCHOOLS.

OUR law has eſtabliſhed very plain, but effectual regulations for the keeping of ſchools. In every town, where there is but one eccleſiaſtical ſociety, wherein are ſeventy families, or more, and in every eccleſiaſtical ſociety (where there are more than one in a town,) containing ſeventy families or more, there ſhall be conſtantly kept and maintained, one good and ſufficient ſchool, for teaching and inſtructing youth to read and write, by a maſter well qualified for that purpoſe: and where the number of families is leſs than ſeventy, a ſchool ſhall be kept half the year, and in every county town, there ſhall be conſtantly maintained a grammar ſchool, kept by a ſuitable maſter, acquainted with the learned languages.

But ſuch is the extent of towns and ſocieties, that theſe regulations could have produced but little effect in the general diffuſion of learning. In conſequence of this, another regulation was adopted, which is calculated to furniſh the means of education, to all the children in the ſtate. Every town which contains only one ſociety, and every ſociety where there are more than one in a town, have the power in legal meeting, to divide themſelves into proper and neceſſary diſtricts, for keeping their ſchools, and to alter and regulate the ſame from time to time, as they ſhall have occaſion: in virtue of this law, every town and ſociety, have been divided into diſtricts of ſuch convenient and ſuitable extent, that all the children within the ſame, can daily attend on ſchools. The law alſo provides that every ſuch town and ſociety, at their annual meetings, may appoint committees, whoſe ſpecial duty ſhall be to ſee that ſchools are kept; and the practice has been every year, to appoint ſome perſon in every diſtrict, to be a committee, who is reſponſible that a ſchool ſhall be kept in the diſtrict, and who has power to procure a maſter for that purpoſe. He uſually aſſembles the members of the diſtrict, to take their voice and direction in the contract with the ſchool-maſter, and any other proviſion that is neceſſary to be made, for the ſupport of the ſchool. In all theſe diſtricts, ſchools are commonly kept, from three to ſix months in a year, but in all the principal towns, ſchools are conſtantly kept.

[p] As diſtricts are conſidered to be the principal organ through which ſchools are eſtabliſhed and kept, additional power has lately been conferred upon them by ſtatute, by which they are better qualified to anſwer the deſign of their inſtitution. The members of the ſeveral ſchool diſtricts qualified to vote in ſociety meetings, have power and authority to levy a tax upon the polls and rateable eſtate of the inhabitants, to build and repair ſchool houſes in ſuch diſtricts; and to appoint collectors, who ſhall have the ſame power to collect ſuch taxes, as ſociety collectors, and to chuſe clerks in ſuch diſtrict, who ſhall be ſworn to make true entries, and give true copies of all their votes and proceedings. For this purpoſe the ſchool committee within each diſtrict or ſuch perſon as he ſhall appoint, ſhall duly warn the inhabitants in the diſtrict, who are liable by law to pay rates, and who are qualified as aforeſaid to vote, to meet at ſome convenient place in the diſtrict, at leaſt three days incluſive, before any tax ſhould be laid. Two thirds of the members qualified as aforeſaid, and preſent, muſt concur in a vote, laying a tax, and fixing the place where a ſchool houſe ſhall be erected.

But it would have been vain, to have paſſed laws requiring ſchools to be kept, if means had not been provided to defray the expenſe. For this purpoſe, the legiſlature have adopted the cheapeſt and moſt effectual expedient. The treaſurer of the ſtate is directed, annually to deliver and pay the ſum of forty ſhillings lawful money, for every thouſand pounds in the liſts of each town, and proportionably for leſſer ſums, out of the taxes annually collected from each town for the ſupport of civil government, to the ſchool committees in the reſpective towns and ſocieties, and for want of ſuch committees, to the ſelectmen of each town; which money ſo received, is to be diſtributed among all the ſocieties, for the benefit of ſchools in proportion to their liſts, and from them ſuch money is to be diſtributed among all the ſchool diſtricts in proportion to their liſts, upon this condition, that the ſociety committee or ſelectmen muſt deliver certificates, that ſchools have been kept, the preceeding year, in the towns or ſocieties, for which the[y] apply, for the money according to law. In this way the money

[p] Statutes, 475.

is collected with the public tax, but is payable only on condition, that the law is complied with.

The legiſlature alſo have diſpoſed of the avails ariſing from the ſale of lands in the ſtate, and from exciſe, to certain towns and ſocieties to be kept as a permanent fund, and the annual intereſt thereof to apply to the uſe of ſchools in ſuch towns or ſocieties, and to be divided among the diſtricts in proportion to their liſt, and to be forfeited on miſapplication, to the ſtate treaſury. In many places, private donations and grants have been made for the ſame purpoſe. In caſe the foregoing proviſion ſhall be inſufficient, then one half the expenſe is to be paid by the inhabitants of the town or ſociety, and the other half by the parents and maſters of the children that go to ſchool: unleſs ſuch town or ſociety otherwiſe agree, which they have power to do; and the law gives them full power to grant and levy taxes for the ſupport of ſchools and to appoint collectors, to collect the ſame: and whatever they ſhall agree upon for the ſupport and encouragement of ſchools, ſhall be binding on the whole. In conſequence of this law, the general practice is, in each town conſiſting of one ſociety, and in each ſociety, where there is more than one in a town, to lay an annual tax for the ſupport of ſchools, to a certain amount on the polls and rateable eſtate, and appoint the ſchool committee in each diſtrict the collectors, by which method, a ſufficient ſum may be at all times raiſed to ſupport ſchools: and the perſons who are to take the immediate benefit of it, have the power to grant the taxes.

The ſelectmen of the town where there is but one ſociety, and the committee of each ſociety, where there are more than one in a town, have the charge of all ſchool funds, whether conſiſting of money, or lands, and have power to let out money at intereſt, and leaſe lands and do all neceſſary acts for the preſervation and management of ſuch funds: excepting where the grantors, or general aſſembly in certain caſes have committed the care of ſuch eſtate, to [illegible] perſons, with direction for a continual ſucceſſion.

The civil authority and ſelectmen in each town, are appointed viſitors

viſitors of ſchools, with power to viſit and inſpect the ſtate of ſchools in their towns, from time to time, and particularly once each quarter of a year, and to enquire concerning the time they are kept, the qualifications of the maſter, and the proficiency of the ſcholars, and to give all neceſſary directions to render them moſt uſeful for the encreaſe of knowledge, religion, and good manners. If they diſcover ſuch diſorders, or miſapplication of public monies allowed for the ſupport of ſchools, as will probably defeat the good end propoſed, they are to lay the ſame before the aſſembly, that proper orders therein may be given.

Since writing the foregoing, the legiſlature in May 1795, paſſed an act, appropriating the intereſt ariſing on the principal ſum that ſhould be obtained by the ſale of the lands belonging to this ſtate, weſt of Pennſylvania, to the uſe and ſupport of ſchools, with the privilege to every eccleſiaſtical ſociety, with the concurrence of two thirds of the inhabitants, to petition to the legiſlature, for the application of their proportion, to the ſupport of the goſpel miniſtry; which the legiſlature have reſerved to themſelves the power to grant during pleaſure. No country can boaſt of a more liberal and noble eſtabliſhment for the ſupport of ſchools of inſtruction, and millions yet unborn, will bleſs the extenſive and patriotic views of the authors of this goodly work.

In the courſe of theſe enquiries, we have treated of towns, ſocieties and ſchools. The peculiarity and importance of theſe inſtitutions, require a more minute diſcuſſion.

Towns in their preſent form, are a corporation which originated in the ſtate of Maſſachuſetts, and are coeval with the ſettlement of the country. Tho it be unqueſtionably a fact, that our anceſtors borrowed the name of towns from the country that gave them birth, yet ſo different are the powers and privileges that are veſted in ſuch corporations here from what they had in England, and ſo little is the reſemblance between the inſtitutions, that our towns ought to be conſidered as an original diſcovery in civil policy. At the firſt ſettlement of an uncultivated country, it was natural to lay it out in ſmall towns, for the purpoſe of accommodating the adventurers who commenced the ſettlement in ſmall parties. When

towns

towns were thus inſtituted, it was natural to veſt them with all the powers neceſſary to manage their internal concerns, and for their mutual protection and defence. It is beyond a doubt that the peculiar ſituation of the firſt ſettlers of this country, led to the diſcovery and eſtabliſhment of towns. The ſame principles induced the firſt ſettlers in this ſtate, to adopt the ſame inſtitution. They therefore divided the country into towns of ſuitable extent, to accommodate the meeting of the inhabitants for civil purpoſes. However unimportant this practice may appear to the careleſs obſerver, yet an attentive examination of it will convince every body, that it is the introduction of a principle, which, if carried to its full extent, may produce the moſt beneficial effects in a republican government.

Towns are probably the moſt genuine democratic corporations, that are to be found in any country. The people have a right to aſſemble perſonally; they have when aſſembled, the power to appoint certain officers, and to paſs certain laws for their internal regulation. The power delegated to towns is reſtricted to ſuch narrow limits, that they cannot encroach upon the government. They are only authorized, and enabled to do certain acts, reſpecting their own immediate and local concerns, which could not conveniently be done by the ſtate legiſlature. Here then by the inſtrumentality of towns, the influence of government may be extended to the minuteſt intereſt of mankind, the moſt perfect order and regularity be eſtabliſhed in every part of the community, and the whole ſtrength of the people be called into action, with the greateſt facility. Theſe popular privileges have a powerful effect upon the perſonal character. Every inhabitant of a town, in virtue of his corporate rights, feels that he is of conſiderable conſequence among his fellow citizens. He does not feel himſelf degraded to the low rank of a ſlave, who has nothing to do, but to obey; but from the ſhare which he has in the government, he is conſcious of the dignity of a freeman, and has a perſonal pride and intereſt, in the ſupport of a government in which he is entitled to ſo much conſideration and reſpect. The ſhare which he has in the adminiſtration of the affairs of a town, teaches him the duty, and the neceſſity of obedience to law,

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and ſubordination in civil ſociety. The obſervation of the neceſſity of order and regularity, to preſerve the tranquility of a town, convinces him of their neceſſity in government. Such ideas grow familiar and habitual. He becomes accuſtomed to think, reflect, and judge upon ſuch uſeful topics with candour and correctneſs. The courſe of his practice and the train of his ſentiments, lead him to be a quiet citizen and a good man, and prepare and qualify him to act an able part, in the higher offices of government. The frequent meetings of the inhabitants of towns for ſuch important purpoſes, give them opportunities of cultivating an acquaintance with each other, and have a powerful tendency to improve their ſentiments, and civilize their manners. They contract a mutual friendſhip, and become united like a band of brothers. Their perſonal reſpect, and eſteem, will prevent thoſe quarrels and contentions, which too often mark the meeting of ſtrangers, or people that collect from large diſtricts.

But the ſingular advantages of this inſtitution are diſplayed in the moſt conſpicuous manner, in the election of public officers. The moderate ſize of the towns, renders the aſſembling of the freemen convenient, and the ſmallneſs of their number, permits a perſonal acquaintance with each other. This prevents them from being the dupes of party and faction. In the choice of the repreſentatives of the ſtate legiſlature, they are too well acquainted with the perſonal character of every freemen to be deceived, and impoſed upon. In the choice of officers, who are elected by the whole ſtate, the great number of towns, prevents the practicability of extending the arts of intrigue effectually through the ſtate. An artful man, may influence a few towns, but it rarely happens that the whole ſtate is operated upon by ſuch influence. We never hear of quarrels, tumults, and riots, at elections: they are generally conducted with good order and propriety. But where people aſſemble from a large diſtrict, the remote parts muſt be ſtrangers to each other, will be actuated by different intereſt, and will have their local friends to ſupport. This naturally leads to diſorder and violence, and the ſcene will be greatly heightened by the numerous concourſe of electors. Hence in ſome countries, the ſeveral candidates, by every art of intrigue, and bribery at-

tempt to obtain votes. Having canvaſſed the diſtrict, to make known their wiſhes, having ſolicited the aſſiſtance and patronage of their friends, and having induced the electors to attend, by a liberal diſtribution of the juice of the grape, they place themſelves at the head of their parties, and continue the practice of their intrigues. Theſe parties armed with clubs frequently meet, dreadful affrays, and riots enſue, well fought battles take place, and the combatants part with broken heads and bloody noſes. It is a ſerious conſideration, that in any part of the union, ſuch practices ſhould be tolerated. The people who are unaccuſtomed to ſuch violence, will hardly think that their liberties are ſafe, in the hands of a man who puts himſelf at the head of an armed mob, to gain an election. Some gentlemen who lament the practice, declare, that in many places, they cannot obtain an election, without ſoliciting and treating the freemen for their votes. A practice ſo diſhonorable to human nature, and ſo dangerous to civil government, ought to be aboliſhed. I know of no mode more effectual to accompliſh it, than to direct the freemen to meet in ſmall bodies, from ſmall diſtricts. In the ſtate of Connecticut, the ſentiments of the people would not permit ſuch arts of intrigue to be practiſed, and the moſt popular demagogue would not be able to excite a riot.

The diviſion of a ſtate into a large number of towns, breaks the ſpirit of ſedition, and weakens the principles of anarchy. The flame of diſcontent cannot circulate with ſo much rapidity, and the ſchemes of faction will be conſtantly interrupted in their progreſs. When the people aſſemble only in ſmall bodies, and the boundaries of a town will limit the place from which they collect, they will generally be cool, and deliberate, and will not be impreſſible by the ſtrong impulſe of democratic violence, and raſhneſs. If there be an attempt to draw the people generally into any ſcheme, there will be no mode, but to elect a number from each town, to meet for that purpoſe. The moment this mode is adopted, the proſpect of much miſchief vaniſhes. The perſons thus elected are placed in a peculiar ſtate of reſponſibility, and when they meet, their number will be ſo ſmall, that they will be more diſpoſed to proceed with deliberation, than to ruſh headlong into meaſures, with the violence of a mob. But

But when the people are allowed to aſſemble in large bodies danger is to be apprehended. Their violence, and inconſideration, ſeem to be proportioned to their numbers. They neither reflect, or deliberate. They are governed by the impulſe of the moment. Fired by the ſlighteſt rumour they are too impetuous to ſearch for the truth. They are ripe for the moſt hazardous, and raſh meaſures. An artful, and deſigning man can direct their motions at pleaſure. They yield the blindeſt ſubmiſſion to the will of their leader. The flame of ſedition flies like the electric fluid inſtantaneouſly from man to man, their impetuoſity encreaſes every moment, there is no enterprize too daring, no ſcheme too horrid for them to attempt. They neither hearken to council, nor yield to oppoſition, they bear down all before them with irreſiſtible fury. The populace of a large city, when convened in a mob, are the moſt dreadful monſter, that ever was let looſe upon civil ſociety. Ignorant, profligate, and headſtrong, they regard no conſequences, they ruſh where paſſion prompts, and death and deſolation mark their progreſs. Experience evinces the truth of theſe remarks, and demonſtrates the impropriety of a civil inſtitution, that requires the people to aſſemble in large bodies. It demonſtrates alſo, the inconvenience of large cities, which will too often be the nurſeries of vice, diſſipation, and ſedition. It is a happy circumſtance, that the locality of Connecticut will not admit the growth of any very large town ; but that the channels of commerce, are diſtributed to ſo many towns, as to prevent the accumulation of great wealth and population, at any one place. A very large city is attended with many inconveniences to ſociety. It concenters too much power in one place. It deſtroys the proper equilibrium, and endangers the exiſtence of the government, and the tranquility of the community. Where a town is likely to grow too large, a rival town ought to be encouraged in ſuch a manner as to direct the channels of buſineſs through every part of the country, and eſtabliſh a number of towns of equal magnitude, that may counterbalance and counteract each other. Theſe obſervations are fully juſtified by the conduct of all large cities.

Eccleſiaſtical ſocieties are a corporation co-eval with our government, and calculated for the purpoſes of religious worſhip,

and moral inſtruction. The right of the people to aſſemble and deliberate in their meetings, furniſhes an opportunity for improvement ſimilar to towns: but the great advantage derived from theſe corporations is, that they lay a foundation for the general diffuſion of uſeful information. In every ſociety, a teacher is employed to inſtruct the people in the duties of religion and morality, on a day ſet apart for that purpoſe. Theſe diſcourſes are not only calculated to prepare a man for a future world, but in doing this they inſtruct him in the duties he owes to mankind. They teach him to reſtrain his vicious propenſities, by the moſt powerful conſiderations. They impreſs upon his mind the principles, and form the habits of virtue. They lead him to think and reflect, upon the moſt important duties of life. They accuſtom the mind to uſeful reſearches, and ſerious contemplation, and point out the neceſſity of regularity in ſociety, and ſubordination in government.

The frequent meeting of friends, and neighbours, for religious worſhip, cultivates and enlivens all the ſocial feelings; it ſoftens, harmonizes, and improves the human heart; it extends the principles of benevolence, and brotherly love. It ſmoothes the aſperities of temper, and poliſhes the roughneſs of diſpoſition. It refines the manners, and liberalizes the ſentiments. Man by ſuch intercourſe, ceaſes to be auſtere, ferocious, and ſavage, and the propenſity to contend and quarrel is loſt in the feelings of humanity. The ſolemnity and regularity of religious worſhip, give to their manners a certain elevation, decency, and dignity, and learn them to treat each other with reſpect, attention and propriety. The reliſh for ſociety, is heightened and the manners improved, without corrupting their morals, or debaſing their ſentiments. To make a reſpectable appearance in ſuch an aſſembly, it is neceſſary that they pay a proper regard to dreſs, and this inſpires them with a taſte for neatneſs, elegance, and cleanlineſs. In fine, religious aſſemblies may be made a noble ſource of uſeful improvement, and rational entertainment.

Schools are an eſtabliſhment, that is calculated to lay the foundation for that early inſtruction, which is neceſſary to make men good citizens. Education is a copious and intereſting theme,

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and has long occupied the attention of legiſlatures and philoſophers. The Perſians the Cretans, and the Spartans, attempted to eſtabliſh a national education. Their views were not directed to the communication of ſcience. Their object was the practice of bodily exerciſes, and the impreſſion of certain ſentiments correſpondent to the nature of their inſtitutions. The Spartan ſyſtem which has been the moſt celebrated, was intended to inſpire with ſentiments of heroiſm, and patriotiſm, the freemen who were ſupported by the induſtry and labour of ſlaves, and did not regard the happineſs of every part of the community.

Quintilian, Milton, Locke, and Rouſſeau, employed their ſublime talents, in ſketching plans for the education of youth: but theſe were calculated for thoſe who had wealth and leiſure, to devote their whole time to the purſuit. They did not contemplate the idea of general education. This honour has been reſerved for the ſtate of Connecticut, and ſome of the other ſtates in New-England. In no other country, have the legiſlature eſtabliſhed, and provided for a ſyſtem of education, that is calculated to diffuſe to all claſſes of the people, that general information which they are capable of acquiring, without interfering with that portion of labour which is neceſſary to obtain a ſubſiſtence.

No man can acquire very extenſive knowledge by his perſonal experience and obſervation. Science has been the reſult of the experience and obſervation of many different perſons, in different ages and countries. By committing their ideas to writing, they have been able to collect, arrange, and mature them, and tranſmit them to ſucceſſive ages. Our ideas muſt be confined to a very narrow circle, unleſs we can unlock the treaſures of learning, and be benefited by written communication of information, from every part of the world. Theſe conſiderations clearly point to that kind of ſcience which is moſt uſeful and neceſſary. On this ſubject, our anceſtors at a very early period of the government, formed a juſt opinion.

Before the year 1672, they paſſed an act, which as it is expreſſive of their peculiar ſentiments and ſtile, is worth tranſcribing.

"It

" It being one chief project of ſatan, to keep men from the " knowledge of the ſcriptures, as in former times, keeping them " in an unknown tongue, ſo in theſe latter times, by perſuading " them from the uſe of tongues, ſo that, at leaſt the true ſenſe " and meaning of the original, might be clouded by the falſe gloſ- " ſes of ſaint-ſeeming deceivers ; and that learning might not " be buried in the graves of our fore-fathers, in church and colo- " ny, the Lord aſſiſting our endeavours. It is therefore ordered " by this court, and the authority thereof, that every townſhip " within this juriſdiction, after the Lord hath encreaſed them to " the number of fifty houſholders, ſhall then, forthwith appoint, " one within the town, to teach all ſuch children, as ſhall reſort " to him, to write and read : whoſe wages ſhall be paid either " by the parents, or maſters of ſuch children, or by the inhabi- " tants in general, by way of ſupply, as the major part of thoſe " who order the prudentials of the town, ſhall appoint : provided " that thoſe who ſend their children, be not oppreſſed by paying " much more, than they can have them taught for in other towns : " and it is further ordered, that in every county town, there ſhall be " ſet up and kept a grammar ſchool, for the uſe of the county, the " maſter thereof being able to inſtruct youths, ſo far as they may " be fitted for college."

They ſoon after paſſed a law, that in every town where there were ſeventy houſholders or more, they ſhould conſtantly have a ſchool maſter able to teach children, to read and write : if leſs, then for half the year. And that there ſhould be a grammar ſchool in every county town. For the maintenance of ſchool maſters, they provided, that every town ſhould annually pay forty ſhillings, for every thouſand pounds in their liſts, and if that ſum ſhould not be ſufficient, the reſidue to be provided, one half by the town, and one half by the parents and maſters of the children.

In the year 1717, an act paſſed, requiring that in every ſociety, where there ſhould be ſeventy families, a ſchool ſhould be kept eleven months in the year, and if leſs, then half the year : and the ſociety ſhould have power to levy and collect taxes for the ſupport of ſchools.

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Such was the manner, in which our anceſtors were led to eſtabliſh, and provide for the ſupport of ſchools. The delegation of power to ſocieties, to levy taxes for that purpoſe, was a wiſe meaſure: but the proviſion for the payment of forty ſhillings, for every thouſand pounds in the general liſt, to be collected with the public taxes, deſerves the higheſt commendation. Tho this ſyſtem of inſtruction may at firſt view appear to be of trifling conſequence, yet an attention to its beneficial effects, will evidence it to be one of the wiſeſt and nobleſt inſtitutions that has ever been diſcovered and adopted, in any age or country. Did I know the name of the legiſlator, who firſt conceived, and ſuggeſted the idea, I ſhould pay to his memory, the higheſt tribute of reverence and regard. I ſhould feel for him, a much higher veneration and reſpect, than I do for Lycurgus, and Solon, the celebrated legiſlators of Sparta, and Athens. I ſhould revere him as the greateſt benefactor of the human race, becauſe he has been the author of a proviſion, which, if it ſhould be adopted in every country, would produce a happier and more important influence on the human character, than any other inſtitution, which the wiſdom of man has deviſed.

Tho the proviſion be ſmall, yet it is placed upon a baſis calculated to produce great conſequences. The law requiring the keeping of ſchools in every ſociety, might have been of difficult execution, had not a ſum been provided for their ſupport, payable only on the condition, that they are kept. This will be a ſufficient inducement to parents to raiſe in ſome other way, a ſufficient ſum to ſupport a ſchool for ſuch length of time, as will be advantageous to their children, in order to obtain the proportion, of the money which will be collected from them, in their public tax, and which they muſt loſe, unleſs they procure ſchools to be kept. The law having exhibited a motive ſufficient to introduce ſchools, their beneficial effects when experienced, will infallibly induce their continuation.

The importance of this inſtitution, is manifeſted by the conſideration, that it communicates to all claſſes, that degree of knowledge which they are capable of attaining. That mankind at large,

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ſhould become ſcholars and philoſophers, is manifeſtly impracticable. It is however, evident, that they are capable of acquiring a portion of ſcience ſufficient to convey them accurate ideas, reſpecting the duties of religion and virtue, to underſtand their own rights, and privileges, and to comprehend ſuch topics for contemplation and converſation, as will give them a reliſh for the ſocial pleaſures. In the common ſchools, children at the time of life when they can be ſpared from labour, may have an opportunity to be inſtructed in reading, and writing, and thoſe branches of the mathematics, which will qualify them for the ordinary buſineſs of life. If gentlemen wiſh to give their children liberal educations and make them men of ſcience, or prepare them for the learned profeſſions, they may ſend them to the colleges. This is a branch of education, with which no government could intermeddle with propriety ; but for the purpoſe of guarding againſt the inconveniences of ignorance, a government is bound to make proviſion for the general education of children.

How noble, how elevated does this ſyſtem appear, when it is conſidered, as calculated to extend the bleſſings of knowledge, to
" all ranks of people, to teach them to aſſert their rights, to regard the laws, and to be happy in the ſocial intercourſe. When we read the ſyſtems of education, which are deſigned for the children of opulent perſons only, how contemptible do they appear, when compared with a ſyſtem that ſpreads information through the whole maſs of the people, and communicates happineſs, as far as it extends. How does the mind expand, how does the heart dilate, at the glorious proſpect of ſuch wide extended happineſs and information. The more I contemplate the ſcene, the more I am delighted. I feel a pride to think that my country has been enriched by ſuch a noble diſcovery. I feel an enthuſiaſm to communicate it to the world, for the purpoſe of extending happineſs to the whole human race.

We are next to conſider the actual influence of theſe inſtitutions upon ſcience, manners, ſociety, and government.

Schools have communicated the rudiments of uſeful literature, to all the claſſes of the people. It is a rare inſtance, that there is

is a perſon of ſufficient age in the ſtate, who cannot read and write and who has not ſufficient knowledge in arithmetic to keep ordinary accounts. It would be deemed a great diſgrace to a parent not to give his children opportunity to acquire knowledge, competent for the common purpoſes of life. The knowledge thus acquired in ſchools, at an early period in life, excites an ardent curioſity, and a ſtrong deſire to purſue it in maturer years. The conſequence is, that ſo great is the reliſh for literature, that many private families, have libraries for themſelves, and there are many inſtances of the aſſociations of neighbourhoods, who at their joint expenſe, purchaſe uſeful and valuable collections of books for common uſe. Reading has become a very common amuſement, and literature a frequent ſubject of converſation. This has rendered the people extremely inquiſitive, reſpecting the events that are paſſing in the world. To gratify this curioſity, a great number of weekly papers are publiſhed, and there are but few perſons who are not at the expenſe of a news-paper, for their amuſement and information.

When knowledge has communicated to people proper ideas reſpecting moral virtue, and the dignity of human nature, they will deſpiſe licentiouſneſs and debauchery. Innocence and purity of manners, will be an object of the higheſt conſideration, and the virtues which embelliſh the human character, will be in repute and in practice. While we do not pretend that our manners are perfectly pure and uncorrupted, it may be ſaid, that they are diſtinguiſhed by decorum and delicacy. We cannot expect that refined politeneſs, that poliſhed elegance, which have diſtinguiſhed ſome nations, among a people, who live in the conſtant practice of induſtry: yet for the purpoſe of ſolid happineſs, our manners will yield to thoſe of no other country. We are a fair medium between the refined diſſipation and extravagant luxury of courts, and the meanneſs and licentiouſneſs of a poor and uninformed people. Our citizens are open in their manners, frank in their ſentiments, and ſincere in their profeſſions. They have a capacity to enjoy, and a diſpoſition to reliſh the charms of converſation, and the pleaſures of ſociety. They are generally eminent for the virtues of ſociability, hoſpitality, and friendſhip. They form extenſive connexions with each

other, and their frequent intercourſe, furniſhes a rational and delightful amuſement. The intercourſe between the ſexes, is characterized by decorum of behaviour, and delicacy of ſentiment, and private families are generally diſtinguiſhed by an uninterrupted enjoyment of domeſtic felicity.

But when we contemplate the influence of theſe inſtitutions with reſpect to the government, they appear moſt conſpicuous and important. We ſee every where good order prevail. The people univerſally acknowledge and expreſs proper ſentiments reſpecting ſubordination to government, and ſubmiſſion to the law. There are no riots, tumults, or ſedition. The equal diſtribution of property among the people, originated from the circumſtances attending the firſt ſettlement of the country, and has been preſerved by the influence of our ſubordinate inſtitutions. The people are too nearly upon a level, to permit many perſons to accumulate great wealth: and whenever it has happened, the diſtribution of it by law, among his children, at his deceaſe, has generally reſtored things to their proper level. This equality of condition, has had a wonderful effect in preſerving the peace, and good order of the community. No man can acquire ſufficient perſonal influence, to diſturb the public tranquility. The people in general are too well informed and have too much individual conſequence, to be the dupes or inſtruments of deſigning men. There are few, who are very rich, or very poor. In eaſy circumſtances, with a moderate ſhare of property, they are generally induſtrious and œconomical. There are few who live without labour, or an attention to buſineſs, and but few who cannot live by their labour. This baniſhes that ſpirit of indolence and diſſipation, which prevails among people who have too much wealth and leiſure: it reſtrains from the purſuit of vicious amuſements, and forms a habit of perſeverance and prudence. The ſtate is divided into ſmall farms, and the proprietor uſually cultivates his plantation with his own hands. The farmers generally live in that eaſe and independence, which kings might envy, and are the happieſt claſs of people on the globe.—When we ſurvey Connecticut, providing for the education of children in their ſchools, laying the foundation of religious and moral inſtruction in their ſocieties, managing their ſubordinate concerns

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in their towns, eſtabliſhing laws beſt adapted to the local circumſtances of the ſtate, in the general aſſembly, and then from a connexion with the government of the United States, obtaining the ſtrength of a powerful nation, to ſecure them againſt foreign foes, and internal violence, we are ſurpriſed with a gradation of political inſtitutions, that is ſingular and compleat. Could ſimilar inſtitutions be introduced into all the ſtates of the union, the general government would be as happy as the nature of the things will admit, and as durable as time.

Chapter Ninth.

OF THE PEOPLE CONSIDERED AS FOREIGNERS AND NATIVES.

THE people are conſidered as aliens, born in ſome foreign country, as inhabitants of ſome neighbouring ſtate in the union, or natural born ſubjects, born within the ſtate.

It is an eſtabliſhed maxim, received by all political writers, that every perſon owes a natural allegiance to the government of that country in which he is born. Allegiance is defined to be a tie, that binds the ſubject to the ſtate, and in conſequence of his obedience, he is entitled to protection. This principle is founded in the fitneſs of things, and nature of government. When man comes into exiſtence, he is incapable of defending himſelf, and wholly dependent on government for protection; he is therefore bound by the ſtrongeſt principles, to be faithful to that government to which he is indebted for ſuch benefits.

Allegiance is either expreſs, or implied. Expreſs allegiance is where a ſubject of the ſtate has taken that oath of fidelity to the government which is preſcribed by law. An oath to ſupport the conſtitution of the United States, muſt be taken not only by the officers of the United States, but by all the members of the ſtate legiſlature, and all officers civil and military. This conſtitutes a public declaration of allegiance to government, and is a confirmation of natural duty: This expreſſed allegiance, derived to us from the oath of fealty, adopted in the feodal ſyſtem, is materially varied from it, and inſtead of being a badge of ſlavery and vaſſalage, is an honorable acknowledgment of ſubjection to legal government.

Implied allegiance is that natural duty of obedience and ſubjection, which every man owes to that government, under whoſe protection he came into exiſtence, and this duty is antecedent to, and independent of any poſitive engagement, and therefore, whether he ſwears allegiance, or not, he is equally liable to puniſhment for high-treaſon. Both theſe kinds of allegiance are divided into natural and local.

Natural allegiance is the perpetual obligation of obedience to government, binding on all mankind. It is a duty which they owe, and which they can never renounce and diſclaim, without the conſent and concurrence of the ſupreme power of the ſtate. This duty is not only perpetual, but univerſal, and the taking an oath of allegiance to another government, does not diſcharge and vacate this natural obligation. It is therefore a ſettled doctrine that let a man remove himſelf into whatever country he pleaſes, he continues to owe allegiance to his native country, and is puniſhable for high treaſon, for joining its enemies, and levying war upon it.

Local allegiance is that ſubjection which every ſtranger, or foreigner owes to the ſtate, while within its limits. It commences on his entering into the bounds of it, and ceaſes on his departure. This allegiance is therefore of a temporary nature, and reſults from the principle that every perſon owes obedience to a ſtate, and its laws, ſo long as they afford him protection.

This doctrine of the common law has been adopted in all civilized nations, and no government has ever preſcribed any mode by which a ſubject can be diſcharged from this natural allegiance. The doctrine of perpetual allegiance, is the law of the United States. This principle ſeems to be reſtrictive of that natural right, which every perſon has to remove himſelf to whatever country he pleaſes, and to join himſelf to ſuch ſociety of men, as he may chooſe. It would be an act of juſtice, as well as humanity, if nations could agree upon a certain mode by which the ſubject of a government could be diſcharged from allegiance to it, and owe that obligation only to the country to which he had removed, and where he had ſettled for life. But until nations will generally agree upon ſome uniform plan, it would be improper for any particular nation,

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ſo ſubject themſelves to the diſadvantage of eſtabliſhing a rule by which their own ſubjects, on abandoning their country, might be diſcharged of their natural allegiance, when the ſubjects of other governments joining them, would not be entitled to a reciprocal privilege.

All nations under greater, or leſſer reſtrictions, have admitted of the principle of naturalization. When a foreigner becomes naturalized, he owes to the country which has adopted him, the ſame allegiance as a natural born ſubject, and at the ſame time is not diſcharged of the allegiance, he owes to his native country. The conſequence is, that a man who has been naturalized, may owe allegiance to two countries, and if a war ſhould break out between them, he may be compelled to take arms againſt his native country, and if captured, inſtead of being treated as a priſoner of war, will be legally liable to ſuffer death asa traitor. There are many perſons who have migrated from Great-Britain, to this country and been naturalized who are in this predicament.

The congreſs of the United States, by the conſtitution, have the excluſive power, to paſs laws for the naturalization of foreigners. All citizens of any of the individual ſtates at the time of the adoption of the conſtitution, became citizens of the United States ; but the ſtates then gave up the power of naturalization to congreſs, for the purpoſe that it might be exerciſed upon the uniform and general principles, which the relative ſituation of the ſtates required. Of courſe, all the the laws of the ſeveral ſtates reſpecting naturalization are repealed, and all proceedings under them are void ; and foreigners muſt conform to the acts of congreſs, to become naturalized.

The ſtates may paſs laws preſcribing the terms on which foreigners may be enabled to hold lands, the mode in which they ſhall be ſupported, and how they may gain ſuch ſettlement, that they cannot be removed. They are only excluded from paſſing acts by which they become naturalized, and have the right of voting for officers of government. No foreigner, can on any terms be admitted to give his ſuffrage for any of the officers of government,

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till he is naturalized; and this power of naturalization is exclusively veſted in the United States.

In regard to the rights and privileges of foreigners, it may be obſerved, that by ſtatute they are rendered incapable of holding lands. The general expreſſion in the ſtatute, comprehends title by deſcent, as well as purchaſe, but whether land purchaſed by or deſcending to an alien, ſhall be forfeited to the ſtate, as in England, or whether the conveyance be a nullity, is undetermined. An alien may acquire perſonal property, and rent a houſe for his habitation, which is allowed for the convenience of commercial intercourſe between nations. This perſonal eſtate he may diſpoſe of by will, and on his deceaſe inteſtate, it deſcends to his heirs according to law. He may bring actions againſt any of the citizens of the ſtate for perſonal injuries, and the recovery of perſonal property, founded on a right originating in the ſtate; but it has been adjudged that our courts have no juriſdiction of contracts made between foreigners, without the dominions of the United States, tho the parties afterwards come into the ſtate. The French by virtue of a treaty with the United States, are by ſtatute entitled to the privileges of diſpoſing of their eſtate, in this ſtate, and on their deceaſe, the ſame ſhall deſcend to their heirs, and legal repreſentatives, according to the laws of France.

It is alſo declared, that the free inhabitants of any of the United States, and foreigners in amity with this ſtate, ſhall enjoy the ſame juſtice and law, as the ſubjects of this ſtate, in all caſes proper for the cognizance of the courts of judicature.

[q] All ambaſſadors, or other public miniſters to the United States, are ſecured in all the privileges and immunities belonging to them according to the laws of nations, and their perſons, and domeſtic ſervants are exempted from arreſts in civil actions. If any injury be done, to any foreign power, or the ſubjects thereof, in perſon or property, ſo that any damage ſhall reſult to them, or the United States, or to this ſtate, or any particular perſon, ſuch perſon who does the injury, ſhall be reſponſible for all damages occaſioned thereby. Theſe rights and privileges extend only to thoſe who are alien friends, but in the caſe of alien enemies, during the time of

[q] Statutes, 83.

of war, they are liable to be impriſoned, if they come into the country, and their property to be taken, unleſs they come by virtue of a ſafe conduct or paſs-port, and then they are protected by law from inſult and injury. The children of ambaſſadors, tho born abroad in a foreign country, are conſidered as natural born ſubjects, becauſe their parents are not ſuppoſed to owe a natural allegiance to the government to whom they are ſent, but that which ſends them, and of courſe their children muſt owe allegiance to the ſame power. The children of aliens, born in this ſtate, are conſiderded as natural born ſubjects, and have the ſame rights with the reſt of the citizens.

I ſhall proceed to conſider the mode by which perſons may gain ſettlement in towns, and the method of proceeding againſt, and removing perſons who are not legal inhabitants.

[r] Our law conſiders perſons reſiding here, in a threefold light: foreigners who are born in ſome foreign dominion: thoſe who are inhabitants of ſome other ſtate in the union: and thoſe who are inhabitants of this ſtate.

No foreigner can gain a legal ſettlement in any town in this ſtate, unleſs he be admitted by the major vote of the inhabitants of ſuch town, or by the conſent of the civil authority and ſelectmen, or ſhall be appointed to, and execute ſome public office. In any of theſe ways, our law authoriſes foreigners to obtain legal ſettlements.

This ſtatute can only be conſidered as making proviſion that foreigners may gain legal ſettlements in towns, ſo that they cannot be removed, and in caſe of being reduced to want, be entitled to ſupport. And when a foreigner has complied with the conditions of the act, he gains a legal ſettlement only for that purpoſe, but the town where he gains ſuch ſettlement cannot admit him to be a freeman, and to participate in the election of public officers. He muſt be naturalized purſuant to the act of congreſs, before he can be admitted to that privilege.

No perſon who is an inhabitant of any of the other of the United States, can gain a legal ſettlement in any town in this, unleſs he be admitted by the major vote of the inhabitants, or by the conſent

[r] Statutes 283.

conſent of the civil authority and ſelectmen, or be appointed to and execute ſome public office, or unleſs he ſhall be poſſeſſed in his own right in fee, of a real eſtate to the value of one hundred pounds during his continuance therein. No time of reſidence will gain a legal ſettlement.

An inhabitant of one town may gain a legal ſettlement in another, by vote of the inhabitants, by conſent of the civil authority and ſelectmen, by being appointed to and executing ſome public office, or by acquiring in his own right in fee, real eſtate to the value of thirty pounds. By a former law, a reſidence in a town one year without warning, or one year after warning without proſecution, gave a ſettlement. This law was ſoon found to be very inconvenient, and reſtrained people from removing from place to place, as convenience and intereſt required. To remedy this, proviſion was made that certificates might be given, by the towns from which ſuch perſons removed, which prevented them from gaining ſettlements in the towns to which they removed. But towns in many inſtances, finding an inconvenience in giving certificates, grew cautious, and it was found very difficult to obtain certificates. The removal of the people from town to town, became reſtricted and many inconveniences were experienced. In many towns, the principle was adopted to warn all perſons who moved into them, which threw many induſtrious and enterpriſing perſons, who wiſhed to better their condition by a change of place, upon the mercy of the towns, from whence they came, to obtain certificates. The expenſe of warning and removing, as well as the trouble, and the diſputes occaſioned thereby, became alarming, and many began to think it would be better to repeal all the laws reſpecting ſettlements, and leave the towns to maintain thoſe who happened to be reduced to want, within their limits, than to vex and embarraſs mankind by ſuch reſtriction, on the rights of removing themſelves according to their intereſt and wiſhes. But the danger that ſome inhuman and unjuſt acts might be done by towns, in attempting to throw the burden upon other towns, prevented the adoption of this plan. The neceſſity however pointed out another plan, which while it gives individuals the liberty of removal, takes away from towns the temptation to practice fraud on each other.

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f In 1792, a law was paſſed, which provided that any inhabitant of any town in this ſtate, by himſelf, or with his family, may remove into another town, and continue therein, without being liable to be warned to depart, or to be removed therefrom, and ſhall gain a legal ſettlement in ſuch town, in caſe he ſhall reſide there for the term of ſix years, and ſhall ſupport himſelf and family, without becoming chargeable to ſuch town, or the town liable to ſupport him, but if he be unable to ſupport himſelf and family at any time before the expiration of the ſix years, and become chargeable to the town, that is liable to ſupport him, he, and his family may be removed to the laſt place of his legal ſettlement. This law gives to the induſtrious and prudent man, a fair chance to change his reſidence, as his intereſt may require, and no town can be under any temptation to ſhift off their poor upon another, becauſe ſuch poor muſt ſupport themſelves ſix years, before they diſcharge the town from their liability to ſupport them.

I ſhall next conſider the ſettlements of infants, and married women.

An infant can never acquire a ſettlement; but he belongs to the place of his father's ſettlement, *s* unleſs in the caſe of a baſtard, and then his ſettlement is the ſame with his mother. If a woman be delivered of a baſtard child in a town where ſhe does not belong, her place of ſettlement will be that of her child. *t* An apprentice being a minor, gains no ſettlement by reſidence with guardian or maſter.

If a woman marries a man who has a ſettlement in any other of the United States, ſhe ſhall follow the ſettlement of her huſband, tho ſhe has never been there.

u A wife, during her marriage, can gain no ſettlement ſeparate and diſtinct from her huſband.

w If a woman having a ſettlement marries a man that is a foreigner and has none, her ſettlement is ſuſpended during coverture, and his continuance with her. If ſhe be reduced to want during the continuance of her huſband with her, ſhe cannot be ſent to the place

f Statutes 1420. *s* Canaan vs. Salisbury, 5 C. 1790. *t* Town of Salisbury vs. Enfield, S. C. 1789. *u* Law of Women, 99. Burn's Juſtice, Art. Poor. *w* Ibid.

of her settlement, because as it is not the settlement of her husband, he cannot be sent with her, and the law will not admit the separation of husband and wife. They must both be considered as vagrants wherever they are, and may be treated as such, and of course may as well be in one town as another. But if the husband dies, or leaves her, then her settlement revives, and the suspension ceases; for the law will not admit that a person, who has a settlement, shall loose it till another is gained. In such case therefore, the wife may be sent to her place of settlement, before the marriage, and all her children, wherever they were born, will follow her settlement. These rules apply only to foreigners, and not to persons who are inhabitants of any of the other states in the union. These principles were settled in the two following cases.

x A foreigner residing in the town of Windham, married a woman whose settlement was in Norwich. Several children were born, and the husband left the wife, and went to some place unknown. The selectmen of Windham, procured the wife and children to be transported to Norwich, for which an action was brought against the town of Windham. The superior court adjudged that the desertion of the husband, from the wife, had revived her right of settlement, which was suspended during his continuance with her, and that as the children could gain no settlement by themselves, they must follow the mother.

y A woman that had a settlement in Windham, was certificated to Norwich, where she married a man who had a settlement in Norton, in Massachusetts. Her husband removed her out of the state, and left her, and by various removals she came to Norwich, who transported her to Windham, for which action was brought. On the trial it was contended on the part of Norwich, that as she once had a legal settlement in Windham, and a certificate thereof had been given to Norwich, that they had a right to send her to Windham, and if she did not belong there, they were bound to look out for her settlement; that she had married a man who had no settlement in this state, and as he had left her, she might be sent to her place of settlement in this state, before her marriage, on the idea that the same principles would apply to her husband, as if

x Town of Norwich v. Town of Windham, S. C. 1790. y Windham v. Norwich, S. C. 1790.

if he was a foreigner: but the superior court sustained the action, and adjudged that the woman by marrying an inhabitant of another state, lost her settlement in Windham, and followed the settlement of her husband, who could not be deemed in the light of a foreigner; and that therefore she ought to have been sent to the town where her husband belonged, whether he was there or not.

The statute law has provided for the removal of persons from towns, where they have no legal settlement; and for their punishment in case they continue to reside therein, after having been warned to depart.

z A foreigner likely to become chargeable to the state, or who is of an immoral, or vicious character, may by order of the county court, or an assistant, and justice of the peace, or two justices (quorum unus) be transported to the place of his legal settlement, or to some place, within the jurisdiction of the state, or Nation to which he belongs, whenever such authority shall judge it expedient, and that the expence will not exceed the advantage, to be paid by the state if such person be unable.

a If any person who is an inhabitant of any other of the United States shall come to reside in any town in this state, the civil authority, or major part of them are authorised upon application of the selectmen, if they judge proper, by warrant under their hands, directed to either of the constables of said town, to order such person to be conveyed to the State, from whence he came, at the expense of such town.

b If an inhabitant of any town shall reside in another, and within the term of six years shall become unable to support himself, and family, and become chargeable to the town liable to support him, he may be removed in like manner; and where persons removed as aforesaid shall return back to the town, from which they were sent, and abide therein, after warned to depart, they shall be whipped on the naked body, not exceeding ten stripes, and may be removed as often as there shall be occasion.

c The selectmen of any town, are authorised by themselves, or by warrant from an assistant, or justice of the peace to warn any

z Statutes, 82. a Ibid. 383. b Ibid. 383, 420. c Ibid. [illegible]

foreigner, or perſon belonging to any other of the United States, not having become inhabitants of ſuch town, to depart the ſame, and the perſon ſo warned ſhall forfeit, and pay to the treaſurer of ſuch town, ten ſhillings per week, for every week he ſhall continue therein, after warning, and if unable to pay ſhall be whipped on the naked body, not exceeding ten ſtripes, unleſs he ſhall depart the town within ten days after ſentence given, and reſide no more therein without leave of the ſelectmen.

If any inhabitant of any town, ſhall hire, or entertain, or let any houſe, or land to any foreigner or inhabitant of any other of the United States, unleſs he firſt give ſecurity to the acceptance of the authority and ſelectmen, to ſave the town harmleſs from expenſe, ſhall forfeit, and pay to the treaſury of the town, ten ſhillings per week. The ſelectmen are directed, and empowered to proſecute all breaches of the act.

By the ſtatute removals are by warrant and not by order. The law has not veſted any deſcription of men with the power of making an order, for the removal of a pauper, and then given the liberty of an appeal from ſuch order to the town where ſuch pauper is removed, in caſe they diſpute his ſettlement in ſuch town, and wiſh to try the queſtion. When a pauper is ſent to a town, to which he does not belong, ſuch town has a right by warrant to remove him to his place of ſettlement, but may not return him to the town from which he was ſent, unleſs it be his place of ſettlement. But in all caſes where a town removes a pauper, to a town of which he is not an inhabitant, an action of treſpaſs on the caſe will lie in favor of the injured town, by which the place where the pauper is legally ſettled can be aſcertained. But as towns are ſometimes unwilling to commence actions, paupers have ſundry times been removed between towns, before an action was commenced, by which they were much diſtreſſed, and injured. It would therefore be more conſiſtent with humanity, and juſtice, to authorize certain authority to make orders of removal, and then if any town conteſted their validity, give them an appeal to ſome ſuperior juriſdiction, where the right of ſettlement could be fairly, and definitively determined: and not permit towns to harraſs the

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poor by ſending them backwards, and forwards, as long as they pleaſed, till they are diſpoſed to ſettle the queſtion legally.

d If any perſon ſhall by reaſon of ſickneſs, in any town where he does not belong, occaſion a charge to ſuch town, the ſelectmen ſhall lay the account thereof before the county court in the county, where the town is to which ſuch perſon belongs, who having adjuſted, and allowed the ſame, as they think reaſonable ſhall order payment thereof by the treaſury of ſuch town, or in want thereof by the ſelectmen, and award execution accordingly; provided that ſuch perſon be unable to ſupport himſelf, and has no maſter, or relations liable to ſupport him.

e In all caſes where a town have incurred any expenſe in providing for the ſupport of a pauper, belonging to another town, action of aſſumſit will lie at common law notwithſtanding the proviſion of the ſtatute, to recover ſuch expenſe, and this is the moſt uſual method to decide the legal ſettlement of paupers.

Formerly where a pauper was to be removed to a diſtance, he was ſent by conſtables from town to town, to the place of ſettlement; *f* but now the town removing him, muſt ſend him to the place where he belongs. A practice was once introduced of tranſporting paupers through the ſtate, by conſtables from town, to town, where they wiſhed to ſend them from one ſtate to another, as from New-York to Rhode-Iſland, but to ſave ſuch expenſe, the ſtatute law provides, that any perſon who ſhall bring any poor and indigent perſon, into any town in this ſtate, of which he is not an inhabitant, and leave him there, ſhall forfeit twenty pounds to the uſe of ſuch town.

d Statutes, 228. *e* Town of Thompſon vs. town of Wallingford, S. C. 1791. *f* Statutes 420.

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A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

BOOK SECOND.

Of the Rights of Perſons.

CHAPTER FIRST.

OF RIGHTS IN GENERAL.

IN the firſt book of our enquiries, we have treated of the conſtitution and form of government, eſtabliſhed to ſupport the rights and redreſs the wrongs of the people. The power and duty of every perſon who acts in a public capacity, have been fully delineated, and the juriſdiction of courts that adminiſter juſtice, has been clearly defined. We come next to conſider the rights of individuals, the preſervation of which, is the higheſt duty of public officers, and the ultimate object of legal government. For the more accurate comprehenſion of this ſubject, it is proper to obſerve that perſons may be branched into ſeveral diviſions. Perſons are public and private. Public perſons have already been conſidered as being the inſtruments by which government is maintained and executed. Private perſons are the ſubjects of government, and derive from it, the exerciſe and enjoyment of certain rights and privileges. Perſons are again divided into natural and artificial. Natural, are ſuch as are formed by the hand of nature. Artificial, are ſuch as are formed for the purpoſes of ſociety, as corporations, and bodies politic.

When we conſider man, as the ſubject of civil law, we are to contemplate

contemplate only certain rights, from the peaceful enjoyment of which reſults the higheſt happineſs which he is capable of attaining. If the exact extent of theſe rights were indiſputable, and the obſervance of them held ſacred and inviolable, there would be no neceſſity of law or government. But the different ideas of mankind reſpecting right, and the general propenſity to infringe it, have laid the foundation of civil inſtitutions. This infringment of right is denominated, wrong. When we have aſcertained the rights, we eaſily ſee, that the deprivation, or violation of them conſtitute thoſe injuries or wrongs, which it is the object of courts to redreſs. The reſtoration of theſe rights, when taken away, and the reſtitution of adequate compenſation, when violated, are thoſe exerciſes of government which are denominated, juſtice.

Rights are of a twofold nature, abſolute, and relative. Abſolute rights belong to men in their individual capacity. Theſe are three, and are denominated the rights of perſonal ſecurity, perſonal liberty and private property. Relative rights reſpect mankind in their ſocial connection with each other. Theſe are the relations of huſband, and wife; parent, and child; guardian, and ward; maſter, and ſervant.

While we are contemplating the rights of man, it may with propriety be remarked, that they are divided into natural and civil. Natural rights are ſuch as appertain to individuals in a ſtate of nature—Civil rights reſult from the inſtitution of ſociety—But it muſt not be imagined that natural rights are eſſentially different from civil, for the natural rights are the baſis of civil. Natural rights conſiſt in our poſſeſſing, and enjoying the power, and priviledge of doing whatever we think proper, without any other reſtraint than what reſults from the laws of nature—The inconveniences that mankind have experienced in this ſituation, has induced them to enter into the ſocial ſtate, by a reſignation of ſome portion of natural rights, for the purpoſe of acquiring complete ſecurity for civil rights—Natural Rights are converted into civil by ſubjecting them to certain reſtrictions and limitations, by which they are rendered ſecure, and permanent. Civil rights may therefore be defined to be the exerciſe and enjoyment of natu-

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ral rights, in that limited qualified manner, which is prescribed by law and is necessary to their security, and the peace and good order of society, and by reason of which, he acquires certain other civil rights, resulting from the social state. When an individual resigns part of his natural liberty, to a superior, he thereby gains the aid and assistance of that superior, in guarding and defending his right of civil liberty, against all illegal encroachments. When a man submits to the rules and forms of law, in the acquisition of property, he finds those rules and forms render the enjoyment of it safe and permanent.

Our entering into a state of society, does not restrict us in all our natural rights, but many are left untouched. Mankind are restricted from injuring each other in person, character, and property; and are inhibited from commiting certain crimes, which endanger the existence of society. But they possess all the freedom of the natural state, in the exercise of the acts of humanity, generosity, and benevolence: in the formation of the connexions of friendship, and in that intercourse between each other, which constitutes the manners of the country. The rules of conduct are derived from common opinion and general custom. Nations are not less distinguished by the refinement of manners, and the progress of civilization, than by their laws and government. This subject belongs however to the investigation of the moral character of man; but as these enquiries respect him only in his civil capacity, I shall consider those rights only which are denominated civil, and the violation of which is punished by compelling the wrong doer to make reparation to the party injured.

Chapter Second.

OF THE RIGHT OF PERSONAL SECURITY.

PERSONAL security consists in a man's having the peaceable enjoyment of life, limbs, body, health, and reputation.— 1. The preservation of life is an object of the first consequence in all governments, and the taking of it away is punishable with death. To the person injured, no reparation can be made, and therefore the

public only can profecute the offender. In England, an appeal is given to the wife, or ſon of the deceaſed, againſt the murderer, who on conviction, cannot be pardoned: but here, no ſuch mode of proſecution has been admitted. *g* The law regards an infant even in the mother's womb, and if it be in any way killed, it is a great miſdemeanor. It is alſo capable of taking a legacy, and an eſtate limited to its uſe.

Life is the gift of God, and the moſt important right that mankind enjoy. No man has a right to diſpoſe of, or take away his own life, nor may it be deſtroyed by any of his fellow creatures, on their own authority; but as it has been found neceſſary to maintain civil government, that the power of taking away life, for the commiſſion of certain crimes, immediately tending to its diſſolution, ſhould be veſted in the ſupreme power of the ſtate, it has therefore become a principle in all countries, that the legiſlature may inflict the puniſhment of death, on certain crimes of the deepeſt die. The law has not only eſtabliſhed thoſe bulwarks to guard this ſacred right, but has authoriſed individuals to exert their own ſtrength and power, to defend their lives when attacked, and they may legally take away the lives of the aſſailants, to ſave their own. A man may avoid a contract, into which he is compelled to enter, through fear of loſing his life.

2. *h* The preſervation of a man's limbs, is an object attended to by law, and eſpecially the eyes, tongue, and privy-members, being thoſe limbs which are of the higheſt conſequence in the enjoyment of life. The deſtruction of them is denominated, mayhem, and the crime is by ſtatute, puniſhable with death. *i* By the common law, mayhem extends to all limbs that may be uſeful to a man in fight, and the crime is puniſhable with death: but the mildneſs of our ſtatute has moderated the rigor of the common law. The law not only guards the limbs of a man, but he has a right to take away the life of another, in defence of either of his members. As the loſs of a member is irreparable, the law will not oblige a perſon to ſuffer it, but will authoriſe him to defend it, at the expenſe of the life of the aſſailant; but to avoid a mere battery the law will not authoriſe the commiſſion of homicide, becauſe, compenſation

g 1 Black. Com. 130. *h* Statutes, 67. *i* 1 Black. Com. 130.

penſation can be made for the injury. A man may avoid a contract which he makes, through a well grounded fear of mayhem, or loſs of limb, which is called dureſs by threats.

3. [k] Not only is a man protected againſt loſs of limb, but the body and the limbs, are protected againſt all menaces, aſſaults, beating, and wounding. Such acts are a breach of the peace, and puniſhable by fine. The perſon injured, has an action of treſpaſs for aſſault and battery, againſt the wrong-doer, to recover damages for the injury he has ſuſtained. This ſecurity of our body and limbs, from all corporal injuries, is an ineſtimable right. When we come to conſider the various kinds of actions, to obtain redreſs for injuries, we ſhall ſpecificate thoſe acts, which are an infraction of this right, and for which a remedy is given.

4. The preſervation of health, ſo eſſential to the enjoyment of the bleſſings of life, is regarded by law. An action lies for a perſon to recover damages for any injury he ſuſtains in that repſect. The legiſlature have been careful to preſerve the health of the people, by preventing the introduction of contagious diſorders, and their ſpreading when introduced.

5. A man's reputation and good name, is ſecured from ſlander, detraction, and defamation. A good character, is the ſource of ſome of our higheſt enjoyments, and the preſervation of it from the blaſt of envy, and the tongue of malice, is one of the moſt eſſential benefits we derive from ſociety. Whoever attempts to wound the reputation of another, by ſpeaking ſlanderous words, ſpreading defamatory reports, publiſhing ſcandalous libels, or exhibiting ludricous pictures, ſhall anſwer to the party injured all damages that he ſuſtains, by ſuch unjuſtifiable conduct.

The nature and extent of theſe rights will be eaſily comprehended by this conciſe deſcription. It is difficult to ſay much about them, without taking into conſideration thoſe acts, which amount to a violation of them. This belongs to that part of our enquiries, that relates to perſonal wrongs, and their remedies, which muſt be deferred, till we treat of that ſubject, and then this point will be reſumed, and largely diſcuſſed.

[k] 1 Black. Com. 134.

CHAPTER THIRD.

OF THE RIGHT OF PERSONAL LIBERTY.

THIS ſacred and ineſtimable right, without which all others are of little value, is enjoyed by the people of this ſtate in as full extent, as in any country on the globe, and in as high degree as is conſiſtent with the nature of civil government. No individual, or body of men, have a diſcretionary, or arbitrary power to commit any perſon to priſon; no man can be reſtrained of his liberty; be prevented from removing himſelf from place to place, as he chuſes; be compelled to go to a place contrary to his inclination, or be in any way impriſoned, or confined, unleſs by virtue of the expreſs laws of the land. Theſe laws are ſo clear and explicit, that it is in the power of every man to avoid breaking them, and if he be committed to priſon, it muſt be the effect of his own fault.

In matters of a criminal nature, tho every offender may be apprehended by private perſons, yet they muſt be immediately carried before proper authority, complaint muſt be entered by ſome informing officer, the court muſt make enquiry reſpecting the truth of the accuſation, and if a probability of guilt appears, the offender may be committed to priſon, and held for trial. But without ſuch a proceeding, no criminal can be impriſoned, and even then it can be done only for capital offences; all others being bailable; and the criminal will not be impriſoned, if he be able to procure bail. If the offence be not bailable, or the criminal unable to procure bail, be committed to priſon, there are courts of law conſtituted for the trial of all offences, which ſit ſo frequently, that a perſon can lie in a priſon but a ſhort time, before he will have a fair opportunity of manifeſting his innocence, or of being proved guilty, and obtaining his enlargement, by ſuffering the puniſhment that his crime deſerves.

How different is this from the practice of all deſpotic governments. There the monarch has power to commit a man to priſon, upon any pretence whatever, and there detain him ſo long as he pleaſes, without bringing him to trial; nor is there any method for the ſubject to obtain his liberty, enlargement, or trial, without

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the conſent of the deſpot. Many inſtances have happened, where innocent perſons who had rendered themſelves obnoxious to a tyrant, have been confined for years; and have even languiſhed out their miſerable lives in the ſolitary manſions of a priſon, deſtitute of the comforts and pleaſures of life, and ſecluded forever from the company and converſation of their families, their friends and the human race. To what a ſtate of degradation and meanneſs, muſt the minds of men be reduced, to be quiet and peaceable amidſt the terrors and cruelties of ſuch a government. How enviable is our ſituation, when compared with almoſt every country on the globe, and how much reaſon have we, not only to be obedient to our laws, but to exert every power to defend and maintain a conſtitution which will render us the freeſt and happieſt nation in the world, if we have a diſpoſition to enjoy thoſe privileges which Heaven has beſtowed upon us.

No perſon can be impriſoned in caſes of a civil nature, if he be able to pay the debt. If he be unable, he may be impriſoned by precept from lawful authority. If a man will be ſo imprudent as to involve himſelf in debts, that he cannot diſcharge, he muſt ſuffer impriſonment, as a conſequence of his imprudence and folly. But even then, if he can procure bonds, he may enjoy certain liberties adjacent to the priſon, and is not ſubjected to the horrors of cloſe confinement. If he be ſo poor that he cannot pay the debt nor ſupport himſelf, the law allows him to take an oath, that he has not eſtate to the value of five pounds, on which he ſhall be diſcharged from priſon, unleſs the creditor furniſhes him with ſupport.

Every confinement of a perſon, in any ſhape, is called an impriſonment, and if it be done without legal authority, it is falſe impriſonment. The legality of impriſonment, conſiſts in its being done by proceſs, precept, or warrant, from proper authority, having power to commit; which muſt be in writing, ſigned by ſuch authority, and expreſſing the cauſe of commitment.

If a man be illegally reſtrained of his liberty, an action of treſpaſs will lie to recover damages, and if he be compelled to execute a contract, to obtain his liberty, he may avoid it. This is called

duress

dureſs by impriſonment: but if a man be lawfully impriſoned, and execute a contract to obtain his diſcharge, then ſuch contract will be binding.

Chapter Fourth.

OF THE RIGHT OF PRIVATE PROPERTY.

THE original right to property is founded in the nature of things. It conſiſts in the power of uſing and diſpoſing of it, without controul. But in a ſtate of ſociety, it became neceſſary for the mutual convenience of mankind, that this natural right ſhould be laid under certain reſtrictions and limitations. We therefore do not appeal to the laws of nature for the title to the property we poſſeſs. This would open the door to endleſs controverſies and diſputes, and would be in a meaſure reverting to a ſtate of nature. But that property may be upon a certain, permanent foundation, there have been certain poſitive rules adopted by mankind, which govern the acquiſition, the uſe, and the diſpoſition of it. Theſe are calculated to give the poſſeſſors a more perfect enjoyment, than can be derived from natural law, and thereby compenſate for thoſe rights which are reſigned, upon entering into ſociety.

The laws of this ſtate reſpecting property, are founded upon principles of juſtice and good policy, and ſecure to the people, the moſt enlarged powers and privileges. Every man in the exerciſe of common reaſon, is capable to acquire property, to uſe and improve it in ſuch manner as he thinks fit, if he injures no other perſon, and to convey, transfer, and diſpoſe of it as he pleaſes, in conformity to certain rules and regulations preſcribed by law. Every perſon has a clear title to the property he acquires, in his own right, independent of any ſuperior whatever, and no one can deprive him of it, without his agreement and conſent, unleſs by force of expreſs law. There is no ſupreme authority, that poſſeſs an arbitrary power to take away the property of any perſon without his conſent, expreſs or implied, even for the ſupport of civil government. The general aſſembly who are elected by the

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people, and to whom they delegate the power of conſulting and acting for the general good, have a right to impoſe taxes upon the people, for the purpoſe of defraying the neceſſary expenſes of government. But as they are the repreſentatives of the people, the people do in fact virtually aſſent to every tax that is granted, and thereby have a compleat ſecurity againſt all unreaſonable and unneceſſary impoſitions of public burdens.

It would be a matter of curioſity to compare our condition, with the greater part of the nations of the earth. In ſome of the moſt fertile countries of Aſia and Africa, where the ſpontaneous productions of nature, furniſh the inhabitants, with all the luxuries and elegances of life, the deſpotiſm of government, has rendered them compleatly wretched and miſerable. The title to their property is dependent on the arbitrary will of the maſter, and all the wealth they can accumulate, is perpetually expoſed to be taken from them, by the hands of the rapacious vultures that govern them. Under ſuch a government, genius droops, induſtry languiſhes, woe and miſery reign triumphant, and happineſs is baniſhed from the land.

Chapter Fifth.

OF HUSBAND AND WIFE.

THE connexion between huſband and wife, conſtitutes the moſt important, and endearing relation, that ſubſiſts between individuals of the human race. This union, when founded on a mutual attachment, and the ardor of youthful paſſions, is productive of the pureſt joys and tendereſt tranſports, that gladden the heart.

This connexion between the ſexes, has been maintained in all ages, and in all countries; tho the rights and duties of it have been very various, as well as the modes and ceremonies, by which it is contracted. [1] The moſt general principle that has been adopted is that a man ſhall have but one wife,—but in the ſouthern climates, and in the countries where the dreary religion of Mohamed has prevailed, polygamy has been introduced, the women have been treated as ſlaves, and conſidered as merely the objects of luſt and

[1] Alexander's Hiſt. Women.

and ſenſuality. The manners of the people, in conſequence of this practice, are barbarous, unpoliſhed, and unſocial. Among ſavage nations, the women are treated as beings of an inferior order, and are ſubjected to all the rigor and hardſhip of ſlavery. The progreſs of nations to civilization and refinement of manners, is marked by an encreaſing attention to the female ſex, and ſociety may be ſaid to have arrived to the higheſt point of improvement, when the charms of their beauty and the ſoftneſs of ther virtues are united in beſtowing the ſweeteſt joys on domeſtic life, when they are conſidered as the equal companions and friends of the other ſex, and when the intercourſe of the ſexes is regulated by ſentiments of decency, delicacy and propriety. Perhaps no country has a better right to boaſt of this ſtate of manners, than America.

Marriage has been deemed a civil contract, in all countries, excepting where the chriſtian religion has flouriſhed. When this religion was eſtabliſhed, marriage was taken under its ſpecial guidance and direction, and the union of the two ſexes was conſidered in a very different light from what it was conſidered by the Pagan nations. Such are the extravagant abſurdities which have been adopted that it is a truth, that the doctrine has been holden, that a man who has taſted the pureſt domeſtic pleaſure, in the arms of a virtuous and lovely wife, becomes polluted, and unfit to miniſter in holy things, at the altar of God, and that the abſtaining from thoſe endearing pleaſures, to enjoy which we are impelled by the ſtrongeſt propenſity of the human heart, is the moſt acceptable ſacrifice to that Being, who created us, and implanted in us the very principles that this doctrine counteracts. From this ſource has flowed the celibacy of the clergy and the monaſtic inſtitutions, where a perpetual warfare between miſtaken duty and natural paſſion, has rendered theſe victims of ſuperſtition, the moſt wretched of mortals.

The Roman catholics have advanced the contract of marriage to the dignity of a ſacrament, and rendered it a powerful and ſucceſsful engine, to promote the aſpiring views of the clergy. In England, marriage is conſidered in a great meaſure, as a matter of ſpiritual juriſdiction. The law points out certain modes to be purſued

ſued to compleat the contract, and deduce the conſequences reſulting from it. But the celebration and diſſolution of it, and the puniſhment of all crimes reſpecting it, are left to the eccleſiaſtical courts, who puniſh only for the good of the ſoul.

But in this ſtate, we have happily thrown off thoſe ſhackles which the devices of men had invented to render mankind miſerable, under the pretence of rendering them religious and preparing them to be happy. This contract, by our law is conſidered merely in a civil light, and the clergy have no power, but to celebrate the marriage, by virtue of expreſs law, in the ſame manner as the civil magiſtrate. All crimes that can be committed by an unchaſte and illegal intercourſe between the ſexes, are puniſhed by the courts of common law.

For a clearer comprehenſion of this ſubject, I ſhall diſtribute it under the following heads:

I. How the contract of marriage may be made, and publiſhed.

II. How it may be diſſolved.

III. How it operates upon the acts of the wife, previouſly done, and of agreements between them during marriage.

IV. The power which marriage gives the huſband, over the eſtate of the wife.

V. How far the huſband is chargeable with the debts of the wife, contracted before, or after marriage, and of a wife who is executrix, or adminiſtratrix.

VI. When a huſband and wife muſt join in ſuing, and be joined when ſued; and when the wife may ſue, or be ſued as a ſingle woman.

VII. Of the power of the huſband over the perſon of the wife, and her remedy for any injury done her, by him.

VIII. How far the acts of the huſband, or wife, alone, or jointly with the wife, will bind the wife.

IX. Of the crimes of the wife, where ſhe alone ſhall be puniſhed

iſhed, and where the huſband is anſwerable for what ſhe does in a civil action. Of each of theſe, I ſhall treat in their order, and,

I. How the contract of marriage may be made, and publiſhed. Under this head, it muſt be obſerved, 1. That the parties muſt be of ability and capacity to contract. 2. They muſt in fact make a contract, and 3. The contract muſt be executed and publiſhed according to the forms and ceremonies required by law.

1. In regard to the ability of perſons, it muſt be noted, that in general all perſons have the power, unleſs they are diſqualified by ſome particular diſabilities or impediments.

1. Want of age incapacitates perſons to make this contract. [m] The age of conſent is fourteen for boys, and twelve for girls; if they marry under thoſe ages, the marriage is imperfect, and the parties when they arrive to the age of conſent, but not before, may agree to the marriage, which renders it valid without further celebration, or diſagree which renders it void. If one of the parties be above, and the other under the age of conſent, then the party above ſuch age, may diſagree, as well as the other, for both muſt be bound, or neither; but ſuch party cannot diſagree, before the other arrives to the proper age.

2. Conſanguinity and affinity, between perſons, diſqualify them to make this contract. [n] The ſtatute law which is copied from the Levitical law, prohibits all perſons within certain degrees of propinquity, by blood or marriage, from intermarrying, declares void ſuch marriages, baſtardizes the iſſue, and puniſhes with great ſeverity, ſuch inceſtuous conduct. [o] All marriages between perſons related in the aſcending or deſcending line, to the remoteſt poſſible degree are prohibited, on the principles, that ſuch inceſtuous connection is repugnant to the law of nature, for the mother would never preſerve and educate the female iſſue, if the father might have acceſs to them, nor the father the male iſſue, if they might aſcend the bed of the mother: that it deſtroys the natural duties between parents and children; for the parent could never maintain that authority, which is neceſſary for the education and government of the child, nor the child

[m] 1 Black. Com. 436. 1 Bac. Abr. 228. 3 Ibid. 129. Co. Lit. 79.
[n] Statutes, 136. Lev. xviii. [o] 3 Bac. Abr. 571.

child that reverence that is due to the parent, if ſuch indecent familiarities were admitted: and there ſeems to be the ſame natural reaſon, which exiſts in the brute creation, that it is neceſſary to croſs the ſtrain, to continue the ſpecies compleat: for there may be the ſame tone and figure of blood, and a ſimilar conformation of veſſels, between near relations, which would render their iſſue torpid and inactive. While a new mixture of others of the ſame kind, where there is a different figure and motion of the blood and ſpirits, may add a new vigor, and ability to the animal œconomy.

The prohibition of marriage among collateral relations, extends to the third degree, and tho the reaſon be not the ſame, as among lineal relations, yet the law is founded in good policy. The marriage of brothers and ſiſters, who muſt be educated together, and of uncles and aunts, with nephews and neices, who from the nearneſs of their relation muſt be familiar with each other, would open the door for ſuch frequent and convenient opportunity for every ſpecies of lewdneſs and debauchery, that a univerſal corruption and depravity of manners would follow, and chaſtity and innocence be baniſhed the world. Every family would be confined to itſelf in the exerciſe of licentiouſneſs and wickedneſs; for ſuch conduct would prevent the extenſion of family connections: a friendly intercourſe which poliſhes and improves the manners of mankind, would ceaſe to connect the different members of the community, and the diffuſion of love and charity, would no longer augment the happineſs of mankind.

The extenſion of the prohibition of marriage to relations by affinity, is grounded on the idea that huſband and wife become one perſon. It is true that the human heart does not feel that natural horror, and averſion againſt a connection with perſons related by affinity, as conſanguinity, but ſo far as the ſame danger of debauchery of manners ariſes from it, there is undoubtedly a propriety in extending the prohibition.

3. *p* A prior marriage, or having a huſband or wife living at the ſame time, diſables perſons from making this contract. If they attempt it, the marriage is void, and they are liable to ſevere puniſhment.

p Statutes 137.

4. *q* A want of reaſon is another diſability. An idiot is wholly incapable of entering into a matrimonial contract, ſo is a lunatic, unleſs in a lucid interval. But if the misfortune to be deprived of reaſon happen to a perſon after marriage, there is no proviſion in law to annul it.

5. *r* When the parties are within age, the law requires the conſent of the parents and guardians (if any) of ſuch perſons, as are under the care and controul of parents and guardians, upon penalty that any perſons who have a right to perform the ceremony of marriage, ſhall pay a fine of twenty pounds, if they marry perſons without the conſent of the parents and guardians; one half to any common informer, and the other to the county treaſury; but the marriage however is valid.

2. *ſ* The parties muſt in fact make a contract, which ariſes from their mutual agreement and conſent, when they labor under no legal diſability, for it is not a familiar intercourſe between the parties, but their conſent, that conſtitutes the contract. By the law of nature, and by the imperial or civil law, a mutual contract, as I marry you; you and I, are man and wife, is a marriage in fact, which the parties cannot releaſe but by mutual agreement. A promiſe to marry in future, would by the cannon law be enforced in the ſpiritual court; but either party could releaſe it, and marriage to another, diſſolved it. But by our law no act of the parties alone can make the marriage valid, and no court can compel the ſpecific performance of a marriage contract; but theſe contracts are ſo far countenanced by our law, that if either party refuſes to fulfil an executory contract of marriage, an action will lie in favor of the injured party, for the recovery of damages, and courts have ſometimes given large damages in ſuch caſes. But here the ſpecial circumſtances of the caſe muſt be taken into conſideration. If the plaintiff be a woman of a fair character, and the conſequence of the promiſe was her ſeduction, then the moſt exemplary damages ought to be given, to make all poſſible reparation for the greateſt injury that a woman can ſuſtain. *t* Theſe promiſes are good tho no time be agreed on, but it is neceſſary to entitle the party to an action, to aver an offer of marriage and refuſal. It has been determined

q 1 Black. Com. 438. *r* Statutes 186 *ſ* 3 Bac. Abr. 573. *t* Ibid 574, 575.

termined that marriage is an advancement and benefit to a man, and that of courſe he may bring an action for the breach of a marriage contract. The action muſt be founded on mutual promiſes, for if it be on one ſide only, it is a naked agreement, and not binding.

u If a man of full age, and a girl of fifteen, promiſe to intermarry, and the man be guilty of a breach of contract, an action will lie againſt him in favor of the woman, for tho the contract was voidable as to her, yet the man ſhall be preſumed to act with ſufficient caution, otherwiſe the privilege allowed to infants, to reſcind their contracts, which was intended for their benefit, might operate to their prejudice.

3. This contract muſt be publiſhed and executed according to certain forms, and ceremonies preſcribed by law.

w Before a marriage can be legally celebrated, it is requiſite that the intention of the parties be publiſhed in ſome public meeting or congregation, on the Lord's day, or on ſome public faſt, thankſgiving or lecture-day, in the town, pariſh, or ſociety, where the parties, or either of them ordinarily reſide, or ſuch intention be ſet up in writing, upon ſome poſt or door of their meeting-houſe, or near the ſame in public view, there to ſtand ſo as to be read, eight days before the marriage.

Magiſtrates, juſtices of the peace in their own county, or juriſdiction, ordained miniſters in the county where they dwell, and during the time they continue ſettled in the work of the miniſtry, are only veſted with the power of joining perſons together in marriage, and an attempt by perſons of any other deſcription is void, and ineffectual.† Theſe regulations have been thought neceſſary for the purpoſe of rendering this contract, which is of ſo much conſequence to civil ſociety, more ſerious, ſolemn and deliberate, to give notice to parents, and all who are intereſted, of the intention of the parties, ſo that meaſures may be taken to prevent it, if unwarrantable or illegal, and to ſtop all private and clandeſtine marriages; but if the marriage be celebrated without conſent or publication, it is valid, and the performer only liable to the penalty.

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u 3 Bac. Abr. 574. *w* Statutes, 136.

† An erroneous opinion has prevailed, that any perſon not a miniſter, or juſtice of the peace, may join perſons in marriage, but this opinion is clearly againſt law, as well as the deciſions of the ſuperior court.

The law has not pointed out any mode in which marriage ſhall be celebrated; but has left it to the common cuſtom and practice, which has been eſtabliſhed from time immemorial. But it may be obſerved, that any form of words which explicitly conſtitute a contract and engagement from the parties to each other, and publiſhed in the preſence of, and by a legal officer, will amount to a marriage according to law.

II. We conſider how the contract of marriage may be diſſolved.

Before the eſtabliſhment of chriſtianity, and in all countries where that religion has not been received, the contract of marriage, has not been conſidered of an indiſſoluble nature; but divorces have been allowed upon a variety of principles. In the rude ages of ſociety, when the manners are rough and unpoliſhed, wives are deemed to be the ſlaves of their huſbands, and they have the power of divorcing them at pleaſure. As the manners of the people improved, the laws introduced ſome regulations, to reſtrain the unreaſonable exerciſe of this arbitrary power; but even in the moſt poliſhed periods of the Grecian and Roman States, divorces were admitted on the moſt trifling pretences. As the manners of the people became more poliſhed, the condition of wives grew more tolerable, and they were allowed the privilege of obtaining divorces, as well as the men. In the early and virtuous period of the Roman republic, it is remarked as an evidence of the purity and ſimplicity of their manners, that notwithſtanding the facility of divorce, there did not happen an inſtance for the ſpace of five hundred and thirty years. Moſes, the inſpired legiſlator of the choſen people of God, has declared, that if a man marry a wife, and ſhe find no favor in his eyes, by reaſon of ſome uncleanneſs, he may give her a bill of divorcement, and diſmiſs her from his houſe. The veſting in the parties, the power of divorce upon ſuch trivial pretexts, muſt have opened the door to every ſpecies of debauchery and wickedneſs. It deſtroys all that reſtraint upon the conduct of married perſons, which is impoſed by the conſideration, that they cannot diſſolve the connection. It inflames thoſe trifling controverſies, which ſo often happen, and leſſens the neceſſity of exerciſing mutual charity and forbearance. It cheriſhes the natural propenſity

penſity to variety, by facilitating the means of obtaining it. The holy author of the chriſtian religion, in purifying the Moſaic inſtitution, has adopted ſentiments of a very different nature. Two of his evangelical hiſtorians, aſcribe to him a prohibition of divorce in all caſes, and one qualifies the prohibition by the exception of one crime, deſcribed by a word of doubtful meaning in the original, but which according to the vulgar tranſlation, cannot be committed by a woman after marriage. Hence all the chriſtian nations immediately admitted the doctrine, that divorces are repugnant to the poſitive precepts of the religion which they profeſs, and of courſe they have been prohibited in all caſes, except for reaſons exiſting prior to the marriage, which rendered it void. In England, in caſes of adultery, a divorce from bed and board only, is allowed, which prevents another marriage. The reformation which relieved mankind from ſo many unneceſſary reſtrictions, upon their happineſs, produced no alteration about divorces. The rendering the contract of marriage indiſſoluble, is running into the oppoſite extreme from that of permitting divorces at the pleaſure of the parties. There are many perſons, who on the idea that the marriage contract cannot be vacated for any miſconduct they are guilty of, will not behave with that propriety that they would if the continuance of the contract were dependent on their exertions to render themſelves agreeable to the perſons with whom they are connected. It is a great hardſhip that a perſon who has been unfortunate in forming a matrimonial connection, muſt be forever precluded from any poſſibility of extricating himſelf from ſuch a misfortune, and be ſhut out from enjoying the beſt pleaſures of life. This conſideration, inſtead of adding to the happineſs of the connection, muſt frighten perſons from entering into it. It is therefore the beſt policy to admit a diſſolution of the contract, when it is evident that the parties cannot derive from it the benefits for which it was inſtituted; and when inſtead of being a ſource of the higheſt pleaſure, and moſt endearing felicity, it becomes the ſource of the deepeſt woe, and miſery.

In this ſtate the legiſlature has wiſely ſteered between the two extremes. We neither admit that marriage is indiſſoluble, ſo as to involve a perſon in wretchedneſs for life, who is unfortunate in

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forming a matrimonial connection; nor do we allow it to be diſſolved upon ſuch ſlight pretences, as give the parties the power of releaſing themſelves from it, when whim, caprice, or a reliſh for variety ſhall dictate. Subſtantial reaſons only, which ſhew that the deſign of marriage is defeated, will have influence, and the validity of theſe reaſons muſt be judged of by a court of law, and not by the party themſelves. The inſtitution of a court for the the deciſion of ſuch controverſies, and the limitation of their power to ſuch caſes as the public good requires to be remedied, gives the practice adopted by our laws, a decided preference to the practice of all other nations, and renders our mode of granting divorces, as favourable as the other modes have been unfavourable, to the virtue, and the happineſs of mankind. The wiſdom and good policy of this law, is evidenced by the conſideration that in no country, is a greater ſhare of domeſtic felicity enjoyed, than in this ſtate.

x Bills of divorce may be granted by the ſtatute reſpecting ſuch caſes, for adultery, fraudulent contract, wilful deſertion for three years, with total neglect of duty, or ſeven years abſence of one party not heard of. The practice has been to grant women divorces, where their huſbands have been guilty of a criminal connection with unmarried women, which crime tho by law amounting only to fornication, has been included under adultery. Application muſt be made by petition to the ſuperior court, ſtating the reaſon for the divorce, and twelve days notice muſt be given to the oppoſite party if within this ſtate. On proof of any of the above recited facts, the ſuperior court will grant a divorce to the aggrieved party, who is then deemed and accounted ſingle and unmarried, and may lawfully marry, or be married again. The reaſons of divorce by ſtatute are ſuch, as ariſe ſubſequent to the marriage, excepting in the caſe of fraudulent contract. The iſſue, however, in no caſe will be baſtardized by the divorce, becauſe the marriage is legal and valid, till annulled, not abſolutely void, but only voidable. In caſes of inceſtuous marriage and biganiy, they are abſolutely null and void, and of courſe the iſſue are baſtards.

y The ſuperior court have power to aſſign to any woman ſo ſeparated, ſuch reaſonable part of the eſtate of her late huſband,

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x Statutes, 41, y Statutes, 137.

as in their diſcretion the circumſtances of his eſtate may admit, not exceeding one third.

= By the common law of England, corporal imbecility, frigidity, or perpetual impotency, exiſting prior to the marriage was a ground of divorce from the bond of matrimony. In our ſtatutes, nothing is mentioned of this reaſon, tho perhaps it may be comprehended under the idea of a fraudulent contract—for we cannot form an idea of a greater fraud, than for one perſon to marry another when labouring under a perpetual incapacity to perform the eſſential duties of the contract. But this point remains to be ſettled in future, as no application has ever been made on this ground to the ſuperior court.

Such is the power delegated by the legiſlature to the ſuperior court; but they have reſerved to themſelves, the power of granting divorces in other caſes. Frequent applications are made to the legiſlature for ſuch purpoſes, and it ſeems to have been adopted as a general rule, that in all caſes of intolerable cruelty, and inveterate hatred, and ſuch groſs miſbehaviour and wickedneſs as defeat the deſign of marriage, and preſumptive proof of a criminal connexion with another perſon, where the poſitive proof required by law cannot be had, divorces may be granted. The reaſons for which the legiſlature grant divorces, are clearly warranted by ſound policy. It would however be leſs expenſive to the ſtate, and equally ſafe for the community to delegate the ſame power to the ſuperior court.

The Statute warrants no divorce from bed and board, but all divorces muſt be in total, and from the bond of matrimony.—The legiſlature however, in one inſtance under the ſpecial circumſtances of the caſe, have granted a divorce from bed and board. This precedent ought not to be imitated, for it is placing them in a ſituation, where there is an irreſiſtible temptation to the commiſſion of adultery, unleſs they poſſeſs more frigidity, or more virtue than uſually falls to the ſhare of human beings.

III. The operation of marriage on the acts of the wife, previouſly done, and of agreements between them during marriage.

= 1 Black. Com. 440.

[a] The huſband and wife in legal conſideration are one perſon, her exiſtence is united with and ſwallowed up in that of the huſband. This union of the huſband and wife, operates as an extinguiſhment, or revocation of ſeveral acts done by her before the marriage. The general rule is, that all acts ſhall be revoked, or extinguiſhed, when it is for the benefit of both; but when it will manifeſtly be to their prejudice, her acts will not be void. Thus if ſhe make a leaſe at will, when ſole, or be leſſee at will, the marriage will not determine the leaſe, nor can ſhe in either caſe determine the leaſe without the conſent of the huſband.

[b] If a ſingle woman enter into a ſubmiſſion to arbitration, her ſubſequent marriage will be a revocation. If a ſingle woman and another perſon join in a ſubmiſſion with a third perſon, her marriage will revoke the ſubmiſſion, as it reſpects the whole without notice, and if an award be publiſhed after ſuch marriage, it will not be binding, even on the perſon, who ſubmitted jointly with the ſingle woman.

[c] All contracts and debts between huſband and wife, that were made before marriage, that were to take place preſently, or might happen during the marriage, are extinguiſhed by the marriage. A man executes a bond to his intended wife, to leave her a certain ſum at his death: the bond is void, but equity will decree payment, on the idea, that it is in the nature of a promiſe or covenant, to leave the wife a certain ſum at his death: ſuch promiſes and covenants not being extinguiſhed by the marriage, as they are to be paid in future, and are not a preſent debt. If the huſband enter into a bond with a ſtranger, conditioned to leave the wife a certain ſum, it will be good.

IV. Of the power which marriage gives the huſband over the eſtate of the wife.

[d] As the law contemplates the huſband and wife as being but one perſon, it allows them to have but one will, which is placed in the huſband, as the fitteſt and ableſt to provide for and govern the family; for this reaſon it gives him an abſolute power over her perſonal property; but he does not become the abſolute proprietor of her real eſtate. He has the power to uſe and improve it, and take all the profits of it during her life. He may leaſe it during life, but cannot make an abſolute ſale of it, without her conſent, as ſhe

continues

[a] 1. Bacon's Abridgment, 291. 5 Coke, 10. [b] Roll. Abr. 332.
[c] 1 Bac. Abr. 291, 292. [d] Ibid. 1. 288.

continues to be the proprietor in fee. [e] In the first settlement of this country, the husband was considered as possessing the power of alienating the lands of his wife, without her knowledge or consent, upon the principle, that by force of the marriage, he became the absolute proprietor of all the lands she owned, at the time of the marriage, or that descended and came to her during that time. This custom originated from the consideration of the little value of lands at that early period. But a statute has been made providing, that the husband shall not alien by deed any estate of inheritance that comes to the wife, before, or during the coverture, unless her consent to such deed be expressed by her hand and seal to the deed, and acknowledged before some assistant or justice of the peace. [f] If a man marries a woman seized of an estate in fee, he gains a freehold in her right. [g] The husband, by virtue of the marriage, becomes the compleat proprietor of the chattels real of the wife, and may dispose of them as he pleases. Thus if a woman be possessed of a term for years, of ever so great extent, and marries, the husband becomes the proprietor of the whole term, and he may dispose of the whole or part, and it is liable to be extended for his debts: but if he dies without disposing of it, then it survives to the wife. He cannot devise such term by will, for that does not operate till after his decease, and of course is no disposition in his life; and then instantly at his decease the term by operation of law reverts to, and revests in the wife. The husband may however execute a lease to take effect at his death, which shall conclude the wife.

[h] All personal estate belonging to the wife, and in her possession, at the time of the marriage, is instantly, and absolutely vested in the husband, and becomes his property. He may use, and dispose of it without her consent, and may give it away by will. In case he never disposes of it in his life time, it shall at his death go to his heirs, and not to his wife, tho she survive him. A bare possession of personal goods will not by marriage, vest them in the husband. If goods are bailed to a single woman, or she finds them, and marries, action must be brought against the husband and wife. [i] Where the goods of a single woman are in the possession of another by trover, or bailment, and she marries, the property which continued in

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[e] Statutes 120. [f] Coke Lit. 351. [g] Co. Lit. 46. 351. [h] Ibid. [illegible]. [i] Sid. 172. Hub. 641. Moore, 25. Vent. 2[illegible]. 2 Lev. 107.

the wife, is veſted in the huſband ; and he alone, without his wife, may bring an action for them. [k] But things in action, where ſhe has a right of action to recover them, as debts, are not abſolutely veſted in him : but he has right to ſue for and collect the debts, and reduce them into poſſeſſion, which gives him an abſolute property in them : but if he fail to collect them in her life time, or to reduce the property to poſſeſſion, then on her deceaſe, ſuch things in action ſhall go to her heirs, and he ſhall have no right only as adminiſtrator to her, but if ſhe ſurvive, then the ſame remains in her. If the huſband ſue an obligation, and obtain judgment and execution, and the wife dies, this is ſuch an alteration of the debt as to reduce it in legal conſideration into poſſeſſion, and the huſband may collect the execution, and ſhall have the money. For wherever the huſband makes any alteration in the ſtate of the debt, ſo as to exerciſe an act of ownerſhip reſpecting it, the law deems it to be a reducing to poſſeſſion. [l] So if the huſband make a letter of attorney to a perſon to receive the money, on obligation due to the wife before marriage, who receives it, and the wife dies, the huſband ſhall be entitled to the money, for by the receipt this was become a thing in poſſeſſion. [m] The huſband has the ſame right to the eſtate of the wife accruing to her during the marriage, as to that which ſhe poſſeſſed at the time of the marriage.

V. How far the huſband is chargeable with the debts of the wife, contracted before and after marriage, and of a wife who is executrix or adminiſtratrix.

The huſband is bound to pay the debts of the wife contracted before marriage, whether he received any eſtate by her, or not ; for as her exiſtence is conſolidated into his, and he has the uſe and profits of her real eſtate during marriage and the abſolute property of her perſonal eſtate, with the advantages of her labour, it is reaſonable that he ſhould pay her debts—for otherwiſe they muſt be wholly loſt, which would be an injuſtice to her creditors, that the law will not authoriſe perſons to accompliſh by their own act. [n] But the debts muſt be collected in the life time of the wife, and if ſhe dies, the huſband is exonerated from the liability to pay them, unleſs a ſuit has been commenced, and judgment obtained,

and

[k] Co. Lit. 351. [l] Roll. Abr. 342. [m] Co. Lit. 351. Roll. Abr. 354. [n] Co. Lit. 351. Sid. 337.

and the wife die before execution be iſſued, or after it be iſſued, and before collection, then the huſband is liable to pay, becauſe the judgment has altered the debt. If the wife ſurvive the huſband, ſhe is perſonally liable for all debts contracted before the marriage, which were not collected of the huſband in his lifetime, or altered by a judgment againſt the huſband and herſelf.

o In reſpect of debts contracted during marriage, it is a general rule, that the huſband ſhall provide for the wife, all neceſſaries ſuitable to his degree, eſtate, or circumſtances: but that ſhe has no inherent power to bind the huſband for any contract, not even for neceſſaries, without his aſſent precedent, concomitant, or ſubſequent, expreſs or implied. The evidence of aſſent muſt be left to the jury to determine, and tho no expreſs conſent, or agreement be proved, yet if it appears that ſhe cohabited with her huſband, and bought neceſſaries for herſelf, children, or family, this ſhall be deemed ſufficient evidence of an implied aſſent, and the huſband ſhall be chargeable. If the wife cohabits with her huſband, let her be ever ſo lewd, he is liable to pay for neceſſaries, for he took her for better or worſe. If he runs away from her or turns her away, or forces her by ill uſage and cruelty, to leave him, he gives her credit wherever ſhe goes and muſt pay her contracts for neceſſaries. If a man be beyond ſea, on a voyage, and the wife contracts for neceſſaries, this ſhall be good evidence of a promiſe to bind the huſband. In theſe caſes, the law goes upon the principle of preſumptive proof of conſent, which ſhall be ſufficient, unleſs contradicted by poſitive proof. If the huſband allows the wife a ſeparate maintenance, or prohibits particular perſons from truſting her, he ſhall not be liable for her contracts, while he pays ſuch ſeparate maintenance, nor to the perſons particularly prohibited, for in theſe caſes, no conſent, but the contrary appears: but a general warning in the gazette, or newspaper, not to truſt her, will not be a ſufficient prohibition. p But where a huſband turns or forces away his wife, he is liable for her contracts for neceſſaries, and cannot make a particular prohibition to any perſon not to truſt her, ſo as to exonerate himſelf from liability. q If a woman elopes from her huſband, tho ſhe does not go away with an adulterer, or live in an adulterous manner, or any perſon truſts her

o 1 Bac. Abr. 295. p 2 Strang. 1214. q Comb. 353.

her at his peril and the husband is not liable for her contracts for necessaries. [r] If a woman elope from her husband, with an adulterer, or lives from her husband, in adultery, he is not liable for her contracts for necessaries. If a woman departs from her husband without his consent, and during her absence, he prohibits sundry persons and particular J. S. to trust her, and afterwards she makes a request to cohabit with him again, and he refuses to receive her, and yet J. S. sells her necessaries suitable to the degree of her husband, yet he shall not be charged: and here this distinction is made, that where the husband forces away the wife, he can make no particular prohibition; but where the wife elopes, even tho she offers to return, yet as she was guilty of the first wrong in eloping, the husband does not lose his right to make a particular prohibition.

[s] A married woman that elopes from her husband, cannot be sued alone and separate from her husband, for any contract whatever; and the only instances where a married woman can be sued alone are, where the husband has abjured the realm, or is exiled, or the like, so as to be deemed politically dead. So that if a person trusts a woman, that has eloped from her husband, he has no possible remedy for the recovery of the debt; and the reason of the law is to prevent women from eloping, by preventing their obtaining credit even for necessaries.

When a man marries a woman that is an executrix, or administratrix, he becomes jointly concerned with her, and they must join in all matters that respect the settlement of the estate. [t] The husband acquires no property in the estate, the wife holds by such right, but is equally accountable with her, as tho he had been executor or administrator himself. [u] If the wife before her marriage shall have committed a waste, in the estate that come to her hands in such capacity, it shall be deemed a devastavit in the husband.

VI. When the husband and wife must join in suing, and be joined in being sued, and when the wife may sue, or be sued as a single woman.

1. It

r 1. Strang. 647. 706. s 2 Black. Rep. 1079. t Co. Lit. 351.
u Cro. Cas. 603. Roll. Abr. 347

1. [w] It is a general rule, that in all cafes where the debt or cauſe of action will ſurvive to the wife, the huſband and wife muſt join in the action, as in recovering debts due to the wife, before the marriage, in an action relating to her freehold, or eſtate of inheritance, or for injuries done to her perſon. If a bond be executed to the wife during the marriage, conditioned to pay money to the wife, the huſband alone may bring an action. [x] Upon an expreſs promiſe to pay the wife a certain ſum, ſhe may join with the huſband in the action, becauſe it will ſurvive, as in the caſe of a promiſe to pay the wife ten pounds, on the conſideration of curing a certain wound, which was to be effected by the ſkill and labour of the wife: but unleſs there be an expreſs promiſe to the wife, ſhe cannot join, for the fruit and labour of the wife, belong to the huſband; for which he only ſhall bring the action. Upon trover before, and converſion after marriage, of the eſtate of the wife, they muſt join in the action. [y] For all injuries done to the perſon of the wife, as battery, falſe impriſonment, ſlander, and malicious proſecution, the huſband and wife muſt join in the action, for the recovery of damages, and if ſhe dies, the action dies with her. [z] But for an injury done to both, as a malicious proſecution, they cannot join. The huſband muſt bring action alone for his injury, and join the wife in an action for the injury done to her.

Where the huſband for any perſonal tort done to the wife, ſuſtains ſpecial damage, he may have his action alone, as in the caſe of a battery, carrying away, detaining, or falſely impriſoning the wife, by which he looſes her comfort and company, and her ſervice and aſſiſtance in his family. For this injury he is entitled to his action. Where the wife was adminiſtratrix or executrix, the huſband muſt join, and they muſt be named as executors or adminiſtrators.

2. [a] The huſband is by law, reſponſible for all the actions for which his wife was liable, at the time of his marriage, and for all her torts and treſpaſſes during the marriage, and the actions in ſuch caſes, muſt be brought jointly againſt them, for if ſhe might be ſued alone, it would be a method of ſubjecting the property of the huſband without giving him an opportunity of defending himſelf.

If

w 2 Lev. 49. 1 Bac. Abr. 305. x Sid. 172. y Rell. Rep. 360.
z Monro & wife, vs. Maples &c. S. C. 1794. a Co. Lit. 133.

If therefore, a man recovers againſt a married woman, as ſole, the huſband may avoid it, by writ of error. *b* If goods come to a married woman by finding, the action muſt be brought againſt the huſband and wife, and the converſion laid in the huſband, becauſe ſhe cannot convert to her own uſe—but as both were concerned in the treſpaſs of taking them, the action muſt be brought againſt both. *c* If a leaſe for life, or years, be made to huſband and wife, reſerving rent, action of debt for rent may be brought againſt both, for this is for the advantage of the wife: *d* but aſſumpſit lies not againſt huſband and wife, for a promiſe made by them during marriage, for as to the wife, it is void.

2. *e* By the common law of England, when a man has abjured the realm, is baniſhed, *f* or tranſported, he is deemed to be dead in a civil point of view, and being diſabled to ſue in right of his wife, ſhe is conſidered as a ſingle woman, for it would be unreaſonable that ſhe would be without remedy, or that perſons who have claims upon her, becauſe they can have no redreſs againſt the huſband, ſhall have none againſt her. *g* If a woman marries an alien enemy and he reſides in a foreign country, ſhe may be ſued as a ſingle woman.

h By a particular cuſtom of the city of London, if a married woman carry on a trade, in which her huſband does not intermeddle, ſhe may be ſued as a ſingle woman. *i* In Equity, the ſeparate eſtate of a married woman, living as a ſingle woman on a ſeparate maintenance allowed by the huſband, on a ſeparation after marriage, has been ſubjected to the payment of her contracts: but the general principle of law has been, that a married woman can have no legal property, and has left all ability to contract, yet in England, ſince the practice of married women living abſent from their huſbands on ſeparate maintenance, has become ſo frequent, Lord Mansfield, on the principle of extending remedies to correſpond with the alterations of manners, and to furniſh relief at law, as far as poſſible in all caſes where equity relieves, has decided that a contract is binding upon a married woman, living ſeparate from her huſband, by agreement, having a large ſeparate maintenance ſettled upon her, continuing notoriouſly to live as a ſingle woman, and contracting

and

b Co. Lit. 132. Roll. Abr. 6. *c* Ibid. 348. *d* Palm. 373. *e* Co. Lit. 133. *f* 1. Bac. Abr. 316 *g* Salk 116 *h* 10 Mod. 6 *i* Pow. on Con. 77.

and getting credit as ſuch, the huſband not being liable; and that ſhe may be ſued as a ſingle woman. Powell in his eſſay on contracts, ſtrongly reprobates this deciſion. He contends that this principle gives the married woman the moral capacity of contracting in all reſpects, the ſame as if ſhe were a ſingle woman, that it militates againſt the firſt principles of the Engliſh law; and that it is blending law and equity, which tho aiming at the ſame end, which is juſtice, are diſtinctly adminiſtered in their reſpective courts, by their particular judges and rules of juſtice. Yet it may be ſaid, that when the law recognized the idea of a ſeparate eſtate of the wife, and a ſeparate living from the huſband, it neceſſarily involved the idea of a power of contracting, and being ſued as a ſingle woman.

But in this ſtate our courts have had no occaſion to take theſe principles into conſideration, for we have not introduced the practice of ſeparate maintenance, and living of the huſband and wife. Nor is it very probable that we ever ſhall, as the granting of divorces, renders ſuch ſeparations unneceſſary: and this may be conſidered as a ſtrong argument in favour of the policy of our law, for theſe ſeparations neceſſarily ariſe from the indiſſoluble nature of the marriage contract, by the Engliſh law.

VII. Of the power of the huſband over the perſon of the wife, and her remedy for any injury done her by him.

i The huſband has power and dominion over the wife, as he is reſponſible for her actions; he may controul, reſtrain, and regulate her conduct, and keep her by force within the bounds of duty, and under due ſubordination and ſubjection. *k* When the wife makes an undue uſe of her liberty, by ſquandering the eſtate of her huſband, or going into lewd company, the huſband may lay her under a reſtraint to preſerve his honor and eſtate—but if he reſtrain her of her liberty unreaſonably, or impriſon her, ſhe may have relief by habeas corpus. *l* It is an old principle of the common law, that the huſband has the power of moderately chaſtiſing the wife for her miſbehaviour, but that this power muſt be confined within reaſonable bounds, and he is prohibited from uſing violence, for if he threatens to beat her outrageouſly, or uſes her

i 1 Bac. Abr. 1. 255. *k* 1 Strange, 478. *l* 1 Black. Com. 444.

outrageouſly, ſhe may ſwear the peace againſt him, and he ſhall be required to find ſureties for his good behaviour.

The practice was undoubtedly introduced in an unpoliſhed age of ſociety, and it is with regret that I mention it as a part of the common law, that the huſband poſſeſſes the barbarous power of chaſtiſing the wife: for the peace, the ſecurity, and the happineſs of domeſtic life, are much more dependent on the morals and the virtues of the people, than political regulations. Where refinement and purity of manners prevail, and the ſentiments of the people are not corrupted and depraved by a licentious and unreſtrained intercourſe of the ſexes, we may expect that tenderneſs and delicacy of ſenſibility which alone can produce permanent happineſs in the coniugal ſtate: but when recourſe is had even to moderate chaſtiſement, to preſerve the balance of power, an everlaſting farewell may be bid to all proſpects of pleaſure and felicity.

In this ſtate, I have never known the queſtion agitated with reſpect to the power of the huſband, to chaſtiſe his wife. If ſuch a queſtion ſhould ever be brought before a court, I hope they will diſcard the ſavage doctrine of the common law, and decide that a huſband is puniſhable for the unmanly act of chaſtiſing his wife.

VIII. How far the acts of the huſband, or wife alone, or jointly with the wife, will bind the wife.

m The huſband has an abſolute power of diſpoſing of the chattels real, and perſonal eſtate of the wife: but of her lands he can only diſpoſe of the uſe and improvement during his life, without her conſent. She may join in conveying or leaſing them, and the contract will be valid. *n* If the huſband leaſe the lands of the wife for a longer term than his life, and ſhe ſurvive, the leaſe will be good, unleſs ſhe expreſs her diſſent, by ſome act after the death of her huſband, for if ſhe accepts rent upon the leaſe, or does any act which amounts to a conſent to the leaſe, it will be binding upon her.

o A married woman is capable of purchaſing, for as this can be no diſadvantage to the huſband, he is ſuppoſed to aſſent to it; but he may diſagree and avoid the purchaſe. If he neither agrees

m Rol. Abr. 246, 347. *n* Co. Lit. 45. *o* Ibid. 3.

grees, or diſagrees expreſsly, the law implies from ſuch conduct, an agreement. But in caſe of an agreement, the wife may after his death, wave it, for having no will at the time of the contract, ſhe is not abſolutely bound by it: and if ſhe does not after the death of the huſband by ſome act expreſs her agreement to the purchaſe, heir heirs may depart from it.

IX. Of the crimes of the wife, where ſhe alone ſhall be puniſhed, and where the huſband ſhall be reſponſible for what ſhe does in a civil action.

A married woman, may be puniſhed for any crime ſhe commits, in the ſame manner as if ſhe were ſingle. If it be of ſuch a nature that it may be committed by her alone, without the concurrence of the huſband, ſhe may be proceeded againſt without him, by way of indictment, or information; for the marriage does not protect the woman in criminal caſes; nor render it neceſſary to join an innocent huſband in the proſecution. *p* The law ſo far favours the wife on account of her ſubjection to her huſband, that if ſhe commits a theft in company with or by the coercion of her huſband, ſhe ſhall not be puniſhed, *q* and ſhe ſhall not be deemed an acceſſary to a crime, for receiving her huſband who has been guilty, tho the huſband ſhall be, for receiving the wife. *r* She cannot be guilty of theft, in ſtealing the goods of her huſband, from the legal conſideration, that they are one perſon—nor can a ſtranger be guilty of theft in receiving the goods of the huſband by the delivery of the wife. *ſ* But if ſhe commit a theft of her own volition, or by the bare command of her huſband, or be guilty of treaſon, murder, or robbery, in company with or by the coercion of her huſband, ſhe is puniſhable as if ſhe were ſingle, becauſe her obligation in ſuch caſes to obey the law, is of a higher nature, than the obligation to obey her huſband. *t* The huſband is not liable to pay any forfeiture, recovered on any public proſecution—but if the wife incur the forfeiture of a penal ſtatute, the huſband may be made a party to an action, or information for the ſame, as he may generally for any ſuit, or cauſe of action given by the wife, and ſhall be liable to anſwer for the damages recovered therein.

p Hal. p. c. 65. Hawk. p. c. 2. *q* 3 Inſt. 108. Hal. p. c. 65. 2 Hawk. 320. *r* Hawk. p. c. 93. *ſ* Hal. p. c. 65. Hawk. p. c. 18. *t* Sid. 373. Lev. 247.

CHAPTER SIXTH.

OF PARENT AND CHILD.

CHILDREN are of two kinds, legitimate and illegitimate, or ſpurious. Legitimate are thoſe which are born within the pale of matrimony. The law is ſo indulgent to the frailties of humanity, that children ſhall not be deemed illegitimate, if the parents will marry at any time before their birth, and therefore their being begotten out of lawful wedlock, is not the criterion, by which illegitimacy is determined, but the intermarriage of the parents ſubſequent to the birth of a child, will not render ſuch child legitimate.

Illegitimate children, commonly called baſtards, are ſuch as are born as well as begotten out the ſtate of lawful wedlock. I ſhall treat of each kind of children, and,

I. Of the reciprocal rights and duties, ſubſiſting between parents and children, who are legitimate.—The duties of parents conſiſt in affording their children maintenance, protection and education. Theſe duties are all founded in nature, and reſult from that ardent affection towards their offspring, which is implanted in the boſom of parents. The duty of maintenance, conſiſts in making proviſion of neceſſaries for the ſupport of children, and is incumbent on all parents who poſſeſs a ſufficiency of eſtate, during the infancy or nonage of their children. Parents are not bound to provide for their children after they become of full age, in caſe they are able to provide for themſelves, but if they are not, then the ſtatute has pointed out their duty, [a] which enacts, that when it ſhall happen, that any perſon, or perſons, ſhall be naturally wanting of underſtanding, ſo as to be incapable to provide for themſelves, or by the providence of God, ſhall fall into diſtraction, and become non compos mentis, or ſhall by age, ſickneſs, or otherwiſe become poor and impotent, and unable to provide for themſelves, and have no eſtate, with which they can be ſupported and maintained, that they ſhall be taken care of and ſupported by ſuch relations as ſtand in the line or degree of father and mother, grandfather and grand-mother, children and grand-children, i they

are

a Statutes.

are of ſufficient ability, which is to be done by order of the county court, where ſuch perſons are, upon application of the ſelectmen of the town, or any one or more of ſuch relations.

The duty of protection, is founded in the nature of the connexion between parent and child, and is enforced by the ſtrongeſt principles. The parent is the natural guardian of the child and may aid, aſſiſt, and uphold him in lawſuits, without being guilty of maintenance, he may juſtify an aſſault and battery, in defence of his children, and ſo indulgent has the law been to parental affection, that where a man's ſon was beaten by another boy, and the father to revenge the quarrel of the ſon, went near a mile and beat the other boy ſo much that he died, this was called manſlaughter only, and not murder.

The duty of parents to furniſh their children with proper education is left by our law, very much to their own conſciences.—Education is undoubtedly an object of the higheſt conſequence to civil ſociety, but it is better generally to leave it to the natural bent of the human mind, for all political regulations will tend to limit and ſhackle the exertions of genius, and prevent that gradual improvement to which the intellectual faculties are always progreſſing. The legiſlature therefore have left the higher branches of education to the diſcretion of the people, and have only made proviſion for a ſufficient degree of learning to prevent their ſinking into barbarity, and to lay the foundation for more important improvements. The law requires, that all parents and maſters of children, ſhall by themſelves or others, teach and inſtruct all children under their care and government, according to their ability, to read the Engliſh tongue well, and to know the law againſt capital offences, and if unable to do this, to learn them the firſt principles of religion.

It is the duty of all parents and maſters, to employ their children and apprentices in labour, ſo as to prevent their living in idleneſs, and all children are to be brought up in ſome honeſt and lawful calling, and employment.

The power of parents over their children, is calculated to enable

able them to perform their duty and keep their childen in obedience and ſubjection. The parent may reſtrain and controul the actions of his children, and may correct and chaſtiſe them while under age, in a reaſonable and moderate manner. The conſent of parents muſt be obtained by minors to their marriage. The father has no power over the eſtate of the child, only as guardian and truſtee. He may receive the profits, during the minority of the child, but muſt account for them when he arrives of full age The parent is entitled to the benefit of the labour of the child, during minority. The period when children arrive to full age, are capable of acting for themſelves, and are liberated from the government of their parents, is at the age of twenty-one years, being the ſame, both for males and females.

The duties of children to parents, are obedience and ſubjection during their minority, and honor, reverence, and reſpect during their lives. As they depended on the aſſiſtance and protection of their parents, during the feeble and defenceleſs period of infancy, ſo when their parents are reduced to a ſtate of infirmity, by old age, it becomes the duty of children to yield the ſame aſſiſtance and protection. The ſtatute law has therefore impoſed upon children the ſame obligation to ſupport their parents when reduced to want, as upon parents to ſupport their children, under like circumſtances; but ſons by marriage are not liable to contribute to the ſupport of the parents of their wives.

[w] By the Roman law, parents had much greater power over their children, than by our law. By a law in the twelve tables, fathers had the power of life and death over their children, and might ſell them. This law however was moderated in the progreſs of improvement: but ſtill the parental power was very extenſive. [x] The children could acquire no property only for the benefit of their parents, and they were liberated from paternal government only by the death of their parents. The paternal authority, extended even to grand-children, and a ſyſtem of domeſtic deſpotiſm ſeems to have been eſtabliſhed by law, repugnant to the happineſs and deſtructive of the rights of mankind.

II. Of illegitimate children, or baſtards, and we ſhall conſider

[w] Juſtinian's Inſtitutes, l. i. tit. 9. [x] Cod. 8. tit. 47.

ſider, 1. Who are baſtards. It has already been remarked, that baſtards are children, begotten and born out of lawful wedlock. [y] By our law, the intermarriage of the parents will not render the iſſue previouſly born legitimate: but by the Roman and canon law, ſuch ſubſequent marriage would legitimate the iſſue previouſly born. [z] All children born ſo long after the death of the huſband, that by the ordinary courſe of nature, they could not have been begotten by him are baſtards. But as this is a matter of ſome uncertainty, as various accidents may retard, or accelerate the birth, the law has not exactly aſcertained the time. The uſual time of geſtation, is allowed to be nine ſolar months and ten days: but a child that was born nine months and twenty days after the death of the huſband, was allowed to be legitimate. A child born eleven months after the death of the huſband, and it being proved that he was incapable of enjoying her within a month before his death, was adjudged a baſtard. [a] A lewd woman after her huſband's death, married her adulterer, and within ſix months and one day, after her huſband's death had a child. It was adjudged to belong to the firſt huſband, becauſe he had the dominion of the woman, at the time of the conception. [b] A wife married immediately after the death of her huſband, and had a child within nine months and eleven days after the death of her firſt huſband. It was adjudged to belong to the ſecond huſband, becauſe born one day after the uſual time, which is the only meaſure to diſcern between them. [c] But if the child be born at the end of the nine months and ten days, ſo as to render it doubtful to which huſband it belongs, it is ſaid, that the child may chuſe his father, when arrived to the years of diſcretion. To prevent this diſpute, the Roman law ordained, that no widow ſhould marry within ten months after the death of her huſband, and by a law in England, before the conqueſt, if a widow married within ten months after the death of her huſband, ſhe forfeited her dower.

[d] By the common law of England, when a man dies leaving no children, and the wife ſays ſhe is with child, the heir at law may have a writ to inſpect her, for the purpoſe of preventing her from impoſing upon him, by a ſuppoſititious heir to the eſtate.

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[y] 1 Black. Com. 456. [z] Rol. Abr. 356. [a] Palm. 9. [b] Rol. Abr. 347. [c] Ca. Lit. 8. [d] Ibid.

The ſheriff is to impannel a jury of matrons, and if on inſpection, they return that ſhe is pregnant, then ſhe is to be kept under proper reſtraint, till delivered. But in this ſtate there has hitherto been no occaſion to adopt this law.

Baſtards may be begotten, and born during lawful marriage. *e* If the huſband be under the age of fourteen, or incapable by reaſon of ſome corporal imbecility to beget children, the iſſue of the wife are baſtards. It is a general rule, that all children born in lawful wedlock, ſhall be deemed legitimate, and the acceſs of the huſband, is to be preſumed in favour of legitimacy : *f* but in all caſes where it can be proved, that the huſband had no acceſs, the children are baſtards—It is immaterial whether the huſband be within or without the empire, but the proof muſt be clear, otherwiſe acceſs will be preſumed.

2. We conſider how baſtard children are to be maintained.—The only duty which the law enjoins on parents towards their illegitimate offspring, is that of maintenance. The father of a baſtard child, poſſeſſes over him no power and authority, and the child is bound to yeild him no obedience. On this account, a ſtatute has been made, pointing out the mode of aſcertaining the reputed fathers of baſtards and the mode of their maintenance. *g* The ſtatute concerning baſtards and baſtardy, enacts, that he who is accuſed by any woman, to be the father of a baſtard child begotten of her body, ſhe continuing conſtant in ſuch accuſation, (being examined on oath, and put to the diſcovery of the truth in the time of her travail,) ſhall be adjudged the reputed father of ſuch child, notwithſtanding his denial thereof, and ſhall ſtand charged with the maintenance thereof, with the aſſiſtance of the mother, as the county court in which ſuch child is born, ſhall order, and give ſecurity to perform ſuch order, and alſo to ſave the town or place where ſuch child is born, free from charge for its maintenance : and the ſaid court may commit to priſon ſuch reputed father, until he find ſureties for the ſame. Unleſs the proofs, evidences, and pleas, made and produced on the part and behalf of the man accuſed as aforeſaid, and other circumſtances be ſuch, as the court who have cognizance of the ſame, ſhall ſee reaſon to judge him innocent

and

e Rol. Abr. 358, 359. *f* Salk, 123. *g* Statutes, 15.

and acquit him thereof, in which caſe, they ſhall and may otherwiſe diſpoſe of the ſame.

And every aſſiſtant or juſtice of the peace, (upon his diſcretion,) may bind to the county court, him that is charged with the begetting of ſuch baſtard child, and if the woman be not then delivered, the ſaid county court may order the continuance, or renewal of his bond, that he may be forthcoming when ſuch child is born.

This ſtatute, by admitting the oath of the woman to prove the father of a baſtard child, introduces a new mode of proof, which is repugnant to the general rule reſpecting evidence; and tho attended with inconveniences, is juſtifiable from the nature and neceſſity of the caſe. It is for the intereſt of the community, that ſome method be adopted to aſcertain the father of ſuch children, for the purpoſe of compelling him to furniſh maintenance, and to relieve the towns where they are born, from ſuch burden. From the nature of the thing, it is impoſſible for any perſon to know the father of a baſtard child, but the mother, and unleſs ſhe be admitted as a legal witneſs, the father could never be diſcovered, all baſtards would become a public expenſe, and this would operate as an additional inducement to a practice to which mankind are now impelled, by a propenſity that deſerves to be checked and not to be ſtrengthened. On this principle then, the ſtatute has introduced the beſt mode of proof which the nature of the caſe will admit. The teſtimony of the woman extends no further than to eſtabliſh the fact, that the perſon accuſed, is the reputed father of the child, ſo that he becomes chargeable with its maintenance. In legal conſideration, it fixes on him no crime, and expoſes him to no puniſhment. But as this mode of proof, gives great advantage to a woman, and ſeems to be a hardſhip on perſons accuſed, the law has guarded it in the moſt effectual manner poſſible. The woman muſt be conſtant in her accuſation, and uniform in her ſtory. If ſhe accuſes different perſons at different times, no credit is to be paid to her teſtimony. She muſt be put to the diſcovery in the time of her travail. At that critical period of danger and diſtreſs, it is ſuppoſed that few women poſſeſs firmneſs and wickedneſs enough to accuſe a man falſely. The ſtatute therefore, has made this

meaſure abſolutely neceſſary, to enable a woman to ſupport this charge againſt the man ſhe accuſes. The omiſſion of this requiſite, can be ſupplied by no other proof; for where a perſon intends to take benefit of a ſtatute, he muſt comply with every requiſite of it. The oath of the woman accompanied with a compliance with the law, is what is called ſtatute proof, and has ſo generally been conſidered as ſufficient evidence to convict a perſon accuſed, that the certainty of conviction when a perſon is accuſed, has become a proverbial expreſſion. It is unqeſtionably true, that the oath of a woman muſt prevail againſt the denial of the perſon accuſed, and that it devolves on him the burden of manifeſting his innocence. The true point of light, in which we are to conſider this matter is, to allow the oath of the woman, to be admiſſible and legal evidence, and then to give the man accuſed the privilege of counteracting, invalidating, and deſtroying her teſtimony, in the ſame manner as is permitted in other caſes. This is clearly warranted by the ſtatute, which authoriſes the court to acquit a man, when he exhibits proof ſufficient to ſatisfy them of his innocence.

The teſtimony of the woman, ought to be corroborated by thoſe circumſtances which uſually attend ſuch tranſactions, and which are the beſt guide to truth. If ſhe ſtand ſingle in her ſtory, unſupported by ſuch collateral circumſtances, ſhe is to be diſtruſted. If the man accuſed can ſhew it to be impoſſible that he is the father of the child, by proving that he was in ſome other place at the time ſhe accuſes him of the fact, or that by ſome corporal imbecility, he was incapable of procreation, he muſt be acquitted. Indeed it may be laid down as a general rule, that if the man accuſed bring proof of ſuch circumſtances, as ſatisfy the court of his innocence, ſuch as a criminal connexion with another man, they may acquit him. Merely the proof of a want of veracity and chaſtity, may not be ſufficient, but thoſe combined with other circumſtances, are to be taken into conſideration. For it is much to be ſuſpected that a woman of notorious lewdneſs and wickedneſs, will accuſe an innocent perſon, for the purpoſe of ſcreening the guilty, or to gratify malice and revenge.

The ſtatute requires an examination of the woman on oath, but this

this may be before or after the birth of the child. It is the uſual practice for a woman, when ſhe diſcovers herſelf pregnant with a baſtard child, to make complaint to a juſtice of the peace, who iſſues his warrant, and the perſon accuſed is brought before him for the purpoſe of holding an enquiry. Such ſingle miniſter of juſtice may at diſcretion bind ſuch perſon to appear at the next county court, and for the purpoſe of exerciſing his diſcretion, ſome enquiry muſt be had—but the authority is bound in duty to recognize the perſon to the county court, unleſs the proſecution appear to be wholly groundleſs, and without any colour of probability. But a proſecution may be commenced by the woman after the birth of the child, in caſe ſhe conformed to the ſtatute as to accuſation at the time of delivery. Within what time however, after the birth of the child, the proſecution ſhall be commenced, or be foreclоſed, has not been determined.

It is provided by the ſtatute, that where the woman omits to bring forward a ſuit, to recover maintenance, and no ſufficient ſecurity is offered to ſave the town from expence, for the ſupport of baſtard children; the ſelectmen may inſtitute a ſuit in behalf of the town, to recover maintenance of the perſon accuſed: and may take up and purſue a ſuit began by the mother of the child for maintenance thereof, in caſe ſhe fail to proſecute to final judgment. *h* If a woman has a baſtard child, and marries before a recovery is had, her huſband cannot join with her in a proſecution for the maintenance, becauſe he is not compellable by law to ſupport ſuch child. *i* But where in ſuch caſe, the woman being dead, the county court admitted her depoſition, taken before any proceſs was commenced, and alſo the juſtice before whom ſhe had ſworn the child, to teſtify what ſhe then ſaid, judgment was reverſed by the ſuperior court, becauſe ſuch evidence was not admiſſible. *k* But the depoſition of the woman in a proſecution in her name, where ſhe was unable to attend the court in perſon, by reaſon of ſickneſs the ſame being legally taken, has been admitted and conſidered as ſufficient evidence for a conviction.

In England there is a proceſs to compel a woman to filiate a baſtard child, that is, to make known the father; but we have

h Baldwin and wife, vs. Cheſeborough, Sup. C. 1790. *i* M'Donald vs. Hobby &c. S. C. 1790. *k* Whitney, vs. Putnam.

no ſuch proceſs, and the mother cannot be compelled to diſcover the man, with whom ſhe has been criminally connected. This defect of our law, has however in ſome meaſure been ſupplied by the practice of ſome midwives--who in caſes, where a private ſettlement had been made, and the women were anxious to conceal the name of the perſon, have refuſed to yeild them any aſſiſtance until they diſcovered the names of their paramours. But the law will not authoriſe a midwife to refuſe her aſſiſtance to a woman in travail, for the purpoſe of compelling her to diſcloſe a ſecret: and when a midwife is employed and refuſes aſſiſtance, for ſuch purpoſe, action would lie againſt her for ſuch a neglect of duty and violation of humanity.

2. The only legal diſability to which a baſtard is ſubjected, is that he is incapable of inheriting, being ſometimes called the ſon of nobody, and ſometimes the ſon of the people. This is the only diſability, which a baſtard, upon the principles of reaſon and juſtice can be made to ſuffer, becauſe he cannot be reſponſible and ought not to be puniſhed for the crimes of his parents. But as he cannot come within the legal deſcription of an heir, on account of the uncertainty of his father, he muſt be excluded from this privilege. A baſtard is capable of gaining a name by reputation.

Chapter Seventh.

OF GUARDIAN AND WARD.

THE father is conſidered as the natural guardian to his children, and during their minority has the care of ſuch eſtate as they may have, and is accountable for the profits to the children, when they arrive to full age, but the common underſtanding of guardian, is where the father is dead, and the guardian is ſubſtituted in his ſtead and ſucceeds to all the powers and duties of the parent. In the inveſtigation of this ſubject, I ſhall conſider, 1. The ages of minors and wards, for different purpoſes. 2. The appointment of guardians. 3. Their power and duty. 4. The capacity of minors to contract. 5. Their liability for acts done by them. 6. The mode in which they muſt ſue and be ſued.

1. Perſons

1. Perſons within the age of twenty-one, are, in the language of the law denominated infants, but in common ſpeech, minors.—Thoſe who are under the government of guardians, are called wards. *l* By ſtatute, males at the age of fourteen and females at the age of twelve, are capable to chuſe guardians, *m* and by common law may conſent or diſagree to marriage, being then arrived at years of maturity or diſcretion, which is called the age of puberty. By the ſtatute law, at ſeventeen years of age, both ſexes are under a capacity to diſpoſe of their perſonal eſtate by will. By common law, at the ſame age, a male may be an executor, and a female an executrix. By the ſtatute law, at twenty-one, they become of full age, are liberated from parental power and become free, which is compleated on the day proceeding the birth-day. *n* By the Roman law, perſons having no fathers, are under the control of tutors till they are fourteen, and curators till they are twenty-five: which is the age in all caſes, when they are of full age, ſo as to be capable of contracting.

2. *o* Guardians are appointed by the courts of probate, to minors under the age of fourteen. Minors of the age of fourteen have a right to chuſe their guardians, who are to be allowed by the courts of probate. When there are minors of age to chuſe guardians, who have neither parents, guardians, or maſters, the judges of courts of probate, in whoſe diſtrict they live or reſide, muſt notify them to appear, and elect guardians, which ſuch courts may allow of—In caſe of neglect or refuſal, ſuch judges may appoint guardians, with the ſame powers as if elected by ſuch minors. The judges of probate, on allowing or appointing guardians, muſt take ſufficient ſecurity for the faithful diſcharge of the truſt according to law, and render their account to the judge, or the minor, when he arrives at full age, or ſuch other time, as ſaid court of probate upon complaint to them made, ſhall ſee cauſe to appoint.

p It has been adjudged, that where a guardian is appointed to a minor by the court of probate, under the age of chuſing one, he is in judgment of law, guardian till the minor arrive at full age, unleſs the guardian be removed from office, or another be choſen after the minor is of ſufficient age, or unleſs the guardian be appointed with expreſs limitation of time.

3 The

l Statutes, 3. *m* 1 Black. Com. 463. *n* Juſtinian's Inſtitute. Digeſt l 4. tit. 4. *o* Statutes 93, 94. *p* Kirb. 287.

3. The guardian being conſidered as a ſubſtitute for the father, the conſequence is, that the power and duty of guardian and ward, in a great meaſure correſpond to that of parent and child. The guardian is intruſted with the care of the perſon and eſtate of the minor. He has power to do every act that is neceſſary for the uſe and improvement of the eſtate, and may execute leaſes of lands.

q Where one or more joint-tenants, or tenants in common, are minors, the guardians with the aſſiſtance of ſuch perſons as the courts of probate ſhall appoint, are impowered to make partition with the other tenants, which ſhall be concluſive upon the minors, their heirs and aſſigns. r When a minor is intereſted in a mortgaged or other real eſtate, which in equity ought to be conveyed to any other perſon, the court having cognizance may enjoin the guardian under a ſuitable penalty, and the guardian is authoriſed to make a conveyance in behalf of the minor, that ſhall be effectual in law, and if there be no guardian at the time of bringing the ſuit, the court may appoint one, with full power.

It is the duty of the guardian to take reaſonable and prudent care of the eſtate of the ward, and to uſe and improve it in the moſt advantageous manner. ſ But he cannot maintain an action in his own name, for any injury done to the land of his ward, ſuch action muſt be in the name of the ward.

When the ward arrives at full age, the guardian muſt account for the rents and profits of the eſtate, and ſhall be allowed a reaſonable compenſation for his expenſe and trouble. He muſt anſwer for all damages ariſing by his miſconduct and neglect. Whenever a guardian is appointed, the court of probate take bonds for a faithful diſcharge of the truſt, and if the guardian miſbehave, and there be danger that he will injure or waſte the eſtate, the court on complaint, may put the bond in ſuit at any time, and call the guardian to account, which ſeems to be the proper mode for minors to call on their guardians to account during their minority: but at common law, a minor may inſtitute a ſuit againſt his guardian under ſuch circumſtances, by his next friend. When the minor arrives at full age, and the guardian neglects to account, the bond may be put in ſuit, or an action of account at common law, may be brought.

4 In

q Statutes 115. r Ibid. 48, 49. ſ Eaſtman, vs. Camp, S. C. 1790.

4. In reſpect of the capacity of minors to contract, the general rule is, that minors have the power of making contracts for their benefit, which are voidable by their own act; but that they can never make a contract to their diſadvantage, that is obligatory upon them, for ſuch contracts are void. [t] If a minor makes a contract for his benefit, that is by which he acquires ſomething, as a purchaſe of lands, or any perſonal property, or where there is a ſemblance of benefit, he may at full age diſſent to the contract and avoid it, or affirm it and render it obligatory: but when he has once made a contract to his benefit, he cannot diſſent to it, till he becomes of full age: becauſe this would be an act in the nature of a contract, that operates to his diſadvantage. Therefore a minor cannot execute a releaſe, or diſcharge of a beneficial contract, without receiving an adequate conſideration. Thus, if a minor holds a note againſt a man, and executes to him a diſcharge, the promiſſor cannot take advantage of the diſcharge, but muſt ſhew that he has paid the ſum due on the note, or he ſhall be holden. A receipt under the hand of the minor, ſhall not be evidence of the payment of money on a note or other debt, if the minor denies the reception of it; but the party muſt make abſolute proof of the payment of money to avoid the note; for it is clearly correſpondent to reaſon and juſtice, that the payment of a debt, or ſum of money due by contract to a minor, ſhall diſcharge the debt, becauſe the reception of the money, is in the nature of a contract to his benefit, and if the contract be obligatory, an actual performance muſt be effectual to diſcharge it.

A minor cannot make a contract to his diſadvantage, or without an apparent benefit, or ſemblance of benefit, that will be obligatory, but the ſame is abſolutely void. He cannot execute a deed of his lands, or transfer his perſonal property. He cannot obligate himſelf by ſimple contract, or ſpecialty. [u] But tho the contract be not binding on the minor, yet it ſhall be on the perſon of full age contracting with a minor; for the law reſpecting the contracts of minors is intended to protect and ſecure them againſt fraud and impoſition, and is calculated ſolely for their benefit. [w] Therefore if one deliver goods to a minor upon a contract, knowing him to be

[t] Co. Lit. 2. [u] Show. 171. [w] Sid. 129.

be a minor, he ſhall not be chargeable in trover, or any other action for them; for the contract being void as to the minor, the delivery ſhall be conſidered as a gift to him.

* If a minor gives a note, and when he arrives to full age, acknowledges it to be juſtly due, and promiſes to pay it, the note becomes obligatory, and if he pleads infancy in bar, it may be avoided by ſuch ſpecial matter.

y But to theſe general rules, there are ſome exceptions. The acts of an infant which do not touch his intereſt, but take effect from an authority which he is truſted to exerciſe, are binding; as if he be an executor, as he may be when ſeventeen years of age, by ſtatute; all the acts which he does in performance of that truſt, are binding.

An act done by an infant, which was right to be done, and which he was compellable by law to do, is obligatory: as if an infant mortgagee, on payment of the money due by the mortgagor, reconvey, the deed is valid, and cannot be avoided: becauſe by law he might have been compelled to have reconveyed. Lord Mansfield ſays, that this privilege is given to minors as a ſhield and not as a ſword, and that therefore it ſhall never be turned into an offenſive weapon of fraud and injuſtice.

z By the common law, a minor can bind himſelf by his contract for neceſſaries, for diet apparel, education, and lodging. a But the ſtatute law of this ſtate, ſuperſedes the common law, and provides that no perſon under the care of a parent, guardian or maſter, ſhall be capable to make any contract, which in the law ſhall be accounted valid, unleſs authoriſed or allowed ſo to contract, or bargain, by the parent, guardian, or maſter, and that in ſuch caſe, the parent, guardian or maſter, ſhall be bound thereby. The action muſt be brought on the contract directly againſt the parent, guardian, or maſter, as tho made by them for their benefit. What ſhall be deemed an authoriſing, or allowing to contract, ſo as to bind the parent, or guardian, is not expreſsly mentioned. b It has been adjudged by the ſuperior court, that a general licence by the guardian, to the minor to trade, ſhall render the contracts of the minor

x Lawrence vs. Gardener, S. C. 1792. y 3 Burr. 1802. z Powel. 34.
a Statutes 142. Kirb. 286. b Spring vs. Evans S. C. 1795.

minor obligatory on the guardian. If a minor have neither parent, guardian, or maſter, he cannot come within the deſcription of the ſtatute, and of courſe will poſſeſs by common law, the power of making contracts for neceſſaries; and this ſeems to be a reaſonable conſtruction of the law, for where a minor has no perſon to provide for him, he muſt have the power of contracting for the neceſſaries of life, but if he have ſome perſon to ſuperintend him, there is no neceſſity that he ſhould be capable to make any contract for his ſupport.

5. [c] Minors are reſponſible for all acts that are called torts or treſpaſſes, whenever they are capable to commit them, but not for any acts that are in the nature of contracts. If a minor affirming himſelf to be of age, borrow a ſum of money, and execute his bond for it, he may avoid it by reaſon of nonage; and no action lies for the deceit; for tho reſponſible for actual torts, as treſpaſſes with force, yet he cannot be for thoſe that ſound in deceit; for if they ſhould, all minors might be ruined: to avoid which they are incapacitated to make contracts, and if they might be ſued for a deceit in contracts, they would be expoſed to the ſame danger, as to be liable for their contracts.

[d] So if a minor on the ſale of a horſe affirm it to be his own, when it belongs to another, yet on action brought for the deceit, if the minor plead infancy, he ſhall not be liable: becauſe the contract being voidable, the plea of infancy avoids it, and it is in the nature of an affirmance, by a minor that he is of full age. If a minor goes about town and pretending to be of age, defrauds by taking up goods upon credit, and then pleads nonage, the perſon injured cannot recover back the goods, or the value, yet he may be puniſhed as a common cheat. [e] Minors are no more liable in equity than at law, for frauds and deceits in contracts.

[f] Minors on account of their youth and inexperience, are deemed incapable to proſecute and defend in ſuits. The law therefore to protect them from any injury in this reſpect, has made it neceſſary that they ſue by guardian, or if they have none, then by the next friend. The parent is called the natural guardian. They cannot be ſued only under the protection of, and by joining the guardian,

[c] Sid. 258. 3 Bac. Abr. 132. [d] Keb. 778. [e] Geer vs. Hovey, S. C. 1790. [f] Rol. Abr. 287, 288.

parent, or maſter, in the ſuit ; if they have none, they may be ſued without, but the plaintiff muſt inform the court, whoſe duty it will then be to appoint a guardian, for the purpoſe of aſſiſting them in their defence. [g] If judgment be rendered againſt a minor, no guardian being cited or appointed by the court, on default, writ of error will lie for the error in fact, and the judgment be reverſed.

Chapter Eighth.

OF MASTER AND SERVANT.

A Servant, is a perſon ſubjected to the power and authority of a maſter for a limited time, upon a particular contract. In diſcuſſing this ſubject, I ſhall conſider, I. Who may be ſervants. II. The power of maſters, and the remedy of ſervants againſt their maſter for injuries, and III. The liability of maſters for the acts of their ſervants,—and of ſervants for their own acts.

I. Servants are of ſeveral deſcriptions.

1. Menial ſervants or domeſtics, who are not however particularly recognized by law, and are ſo denominated from the nature of their employment. The right of the maſter to their ſervices in every reſpect, is grounded on the contract between them. Labourers, or perſons hired by the days work, or any longer time, are not by our law, or in common ſpeech conſidered as ſervants.

2. Poor debtors may by law be aſſigned in ſervice, for the payment of their debts, and rendered ſervants : and for this purpoſe the law provides, [b] that when a debtor is impriſoned, and no means can be found to pay the debt, except by ſervice, then if the creditor deſire it, and the court judge it reaſonable, the ſuperior or county court, ſhall have power to order and diſpoſe of ſuch debtor in ſervice for the purpoſe aforeſaid, to ſome inhabitant of this ſtate, whether the execution by which he is held, iſſued from ſuch court or not. Provided, that ſuch court muſt be ſatisfied by the oath of the parties, that ſuch debtor has not ſufficient eſtate to pay ſuch execution,

[g] Kirb. 116. [b] Statutes, 9, 19.

execution, excepting neceſſaries exempted by law, from execution, and that the debt is really due on good conſideration.

The aſſignment of a debtor in ſervice to pay his debts, is wholly in the diſcretion of the court. As the reſtraint of natural liberty, and the ſubjection of one man to another, is a matter that in many inſtances, is juſtifiable, for the purpoſe of compelling a debtor to diſcharge his debts: and in ſome inſtances may be hard and unjuſt, it would have been better, had the law more expreſsly defined the caſes in which debtors ſhall be aſſigned in ſervice, and not have left it wholly to the diſcretion of a court.—For where the moſt valuable rights of man are concerned, we ought to know preciſely the tenure by which we hold them, and not depend upon the whim and caprice of a judge, who may doom us to ſervitude, in caſes where we had no reaſon to expect it. But courts may by a proper train of deciſions eſtabliſh ſuch a conſtruction of this ſtatute, as to make known with certainty, the circumſtances under which we may be deprived of our liberty, and reduced to ſervitude by the judgment of law. In the caſe of a diſhoneſt debtor, there is the greateſt propriety in compelling him to pay his debts by ſervice, for the purpoſe of puniſhing him and holding him up as a public example. So where, from the character and rank of a man in life, labour is a proper buſineſs, he cannot complain of injuſtice to be compelled to work to pay his debts. But where a man has lived in affluence, and by ſome unforeſeen misfortune and unexpected accident, is reduced to poverty, it would be cruel to aggravate his wretchedneſs, by ſubjecting him to ſervitude. Between theſe extremes, there are a great variety of grades in which courts muſt exerciſe a diſcretion tempered with humanity, in deſignating the proper objects of this law. *i* A debtor cannot be aſſigned in ſervice, to a man and his aſſigns.

3. Children may be bound out in ſervice by their parents, till they arrive to the age of twenty-one, which is frequently done by parents, who are unable to provide for their ſupport. So the children of poor perſons, ſupported by the town, that are ſuffered to live in idleneſs, the children of parents, that cannot provide for them, and children who have none to take care of them, the ſelectmen and civil authority may bind out as apprentices or ſervants, males till the age of twenty-one, and females till eighteen.

i Kitb 34.

Where parents or maſters neglect to bring up children and apprentices in ſome honeſt calling, the ſelectmen and civil authority, may take them away, and bind them to other maſters.

4. Apprentices are minors, who are bound by their parents, guardians, or the ſelectmen, by indentures, to ſome perſons for a term of years, that cannot exceed the age of twenty one, for the purpoſe of being maintained and inſtructed by their maſters, in the art and myſtery which they profeſs. Our law has limited no time which apprentices ſhall ſerve to learn a trade, in conſequence of which the community are greatly injured by unſkilful mechanics. Perhaps the limitation of ſervice for a time, ſuitable to learn each trade, might anſwer a valuable purpoſe, and furniſh the public with good mechanics, without expoſing individuals to the inconvenience experienced in England, where the law requiring an apprenticeſhip of ſeven years, for every trade, has become a ſubject of great complaint: becauſe there are many trades which can be eaſily learned in a much ſhorter period.

5. Negro or molatto children, born of ſlaves, after the firſt day of March, 1784, may be held in ſervitude till they arrive to the age of twenty-five years, and then they ſhall be free. This law has laid the foundation of the gradual abolition of ſlavery, for as the children of ſlaves are born free, being ſervants only till twenty-five years of age, the conſequence is, that as ſoon as the ſlaves now in being ſhall become extinct, ſlavery will ceaſe, as the importation of ſlaves in future is prohibited. The maſters of ſuch negro and molatto children, free at twenty-five, have the ſame power over them as they have over their own: but over their children the maſters will have no power. As ſlavery is gradually abolishing, and will in a ſhort time be extirpated, there being few ſlaves in this ſtate it will be unneceſſary in this place to make any remarks upon a ſubject that has ſo warmly engaged the attention of the humane and benevolent part of mankind in the preſent age. When I treat of the offences of importing ſlaves and tranſporting negroes that are free, I ſhall enter into an hiſtorical detail of the progreſs and termination of ſlavery, for the purpoſe of furniſhing poſterity with all neceſſary information reſpecting a practice, which has ſo long been a diſhonor to human nature.

II. Of

II. Of the power of maſters, and the remedy of ſervants for injuries done them by their maſters.

A maſter may reaſonably and moderately correct, and chaſtiſe his ſervant for negligence, and miſbehaviour. He is entitled to the benefit of his labor and ſervice, and if a ſervant run away from his maſter, and be employed by another, the maſter is entitled to his wages, and can recover them by action. A maſter may maintain an action againſt another for beating and maiming his ſervant: but he muſt aſſign the loſs of ſervice, as the ground of his action; which muſt be proved on the trial, or he cannot recover, the ſervant himſelf being entitled to an action to recover damages for the battery. A maſter may juſtify an aſſault in defence of the ſervant, and the ſervant in defence of his maſter, on the ground of their reciprocal rights and duties. An action lies in favor of the maſter againſt a perſon for enticing his ſervant from his ſervice, or for hiring and retaining him in caſe he knew that he was a ſervant; but if ſuch perſon be ignorant of the fact, no action lies, unleſs he afterwards refuſe to reſtore him, upon information and demand. Where a perſon takes a ſervant forcibly from actual ſervice, treſpaſs will lie in favour of the maſter.

It is provided by ſtatute, that if ſervants or apprentices above fifteen years of age, withdraw or abſcond from the ſervice of their maſters, before their covenants or terms of ſervice are expired, they ſhall ſerve their maſters threefold the time of their abſence. When ſervants or apprentices run away from their maſters, it is lawful for the next aſſiſtant or juſtice of the peace, or conſtable, and two chief inhabitants, in a town, where there is no aſſiſtant or juſtice of the peace, to preſs men and boats (if occaſion be) at the maſters requeſt and charge, to purſue ſuch ſervants and apprentices by ſea and land, and to bring them back by force. When children, or ſervants upon complaint made, are convicted of ſtubborn and rebellious carriage, againſt their parents or maſters, before any two aſſiſtants or juſtices of the peace, they may be committed to the houſe of correction, to remain under hard labor, and ſevere puniſhment, at the diſcretion of the court, who on reformation may order their releaſe, and their return to the parents or maſters.

If

If any ſervant or apprentice flee from the tyranny and cruelty of his maſter, to the houſe of any inhabitant of the ſame town wherein they belong, they ſhall be protected, and ſuſtained, till due order be taken for their relief. Due notice muſt forthwith be given to the maſter, and to the next aſſiſtant or juſtice of the peace, who ſhall cauſe ſaid maſter and ſervant, or apprentice, to come before him, and reconcile them if he can; but if he cannot, then he may according to his diſcretion bind over the maſter to the next county court, and alſo the ſervant or apprentice, or give orders for their ſafe cuſtody and appearance before ſaid court; which court on hearing the matter, may upon default found in the maſter, diſcharge the ſervant or apprentice from his indenture or ſervice; and if default be found in the ſervant or apprentice, may inflict a diſcretionary puniſhment.

Where the ſervant or apprentice are too young, or too much overcome by fear, to fly from the cruelty of a maſter, the law has made no proviſion for their relief, and the maſter can only be puniſhed at common law, for a breach of the peace, in chaſtiſing unreaſonably and immoderately. Perhaps in the improvement of ſociety, it will be diſcovered that the power of parents and maſters, ought further to be reſtrained and controuled, and that cruelty towards children in thoſe tender years, when they are incapable of of defence, ſhall be puniſhed in ſuch manner as to ſecure to them mild and humane treatment in all caſes. In domeſtic government nothing can be more prejudicial in forming the manners of youth, than the ſeverity and rigour too often exerciſed in the corporal puniſhment of children. A ſyſtem of education founded upon the principles of a mild government, and generous treatment of children, can alone improve and cheriſh thoſe virtues, which ſo eſſentially contribute to the welfare of the community.

III. Of the liability of maſters for the acts of their ſervants, and of ſervants for their own acts.

[k] The maſter is anſwerable for every act of the ſervant done by his command, either expreſsly given, or implied, [l] for he who does an act by another, does it in legal conſideration by himſelf. Therefore if a ſervant commit a treſpaſs by the command

or

[k] 1 Black. Com. 429, 430. [l] Qui facit per alium, facit per ſe.

or encouragement of his maſter, the maſter ſhall be deemed guilty of it, as well as the ſervant, for he is bound to obey only the lawful commands of his maſter: but a recovery againſt one will exculpate the other, becauſe a man can have but one ſatisfaction for a treſpaſs. If an innkeeper's ſervant rob, or ſteal from, or do any injury to the property of his gueſt, the maſter is bound to make reſtitution: for in all ſuch caſes there is neceſſarily a confidence repoſed in the innkeeper, that he will provide faithful ſervants. This negligence is therefore conſtrued into an implied conſent to the injury. [m] For he who does not prohibit the doing of a thing when it is in his power, conſents to and commands it. If the ſervant, or drawer at a tavern, ſells a man bad wine, or bad liquor of any kind, by which his health is injured, action lies againſt the maſter; for the permitting the ſervant to ſell bad liquors, tho without expreſs order to ſell to any particular perſon, implies a general command.

[n] The maſter is anſwerable for whatever he permits the ſervant to do in the uſual courſe of his buſineſs, for this is conſidered as amounting to a general command. A wife, friend, or relation, that commonly tranſact buſineſs for a man, are for this purpoſe, his ſervants, and he is accountable for their conduct. If I pay money to the ſervant, wife, friend, or relation, in the uſual courſe of buſineſs intruſted to them, and they embezzle it, I am not accountable for it; but if it be not in the uſual courſe of their buſineſs, I muſt anſwer for it, if they fail to pay it over to the maſter. For in the firſt inſtance, the law implies a confidence, and general command, but in the laſt no ſuch underſtanding of the maſter can be preſumed. If I uſually deal with a tradeſman and conſtantly pay him ready money, I am not reſponſible for what my ſervant takes up on truſt: for here is no implied order to the tradeſman, to truſt my ſervant; but if I uſually ſend him on truſt, or ſometimes on truſt, and ſometimes with ready money, I am anſwerable for all he takes up, for it is impoſſible for the tradeſman to diſtinguiſh when he comes by my order, or when by his own authority.

[o] The maſter is reſponſible for all the damages that ſtrangers ſuſtain, for any negligence, or miſconduct of the ſervant, while he is actually employed in the buſineſs and ſervice of the maſter. If the

[m] Nam qui non prohibet cum prohibere poſſit, jubet. [n] 1 Black. Com. 430. [o] Ibid. 431.

the ſervant of a ſmith lames a horſe while he is ſhoeing him, then an action lies againſt the maſter and not againſt the ſervant. But if the ſervant be not employed in the ſervice of the maſter, then he muſt anſwer for his own miſconduct. A maſter is chargeable if any of the family lay, or caſt any thing out of his houſe into the ſtreet or common highway, to the damage of any individual, or the common nuiſance of the people, for the maſter has the charge of the houſehold, and muſt anſwer for his domeſtics.

[p] If a maſter command his ſervant to do what is lawful, and he miſbehave himſelf, or do more, the maſter ſhall not anſwer for the ſervant, but the ſervant for himſelf, for that was his own act, otherwiſe it would be in the power of every ſervant, to ſubject his maſter to what actions and penalties he pleaſed.

A ſervant is under an obligation to his maſter, to perform his duty with diligence and fidelity. He is not therefore accountable for any damage that happens to the maſter in the courſe of buſineſs intruſted to him, through inevitable accident, but he is accountable for his own negligence and miſconduct. A ſervant or an apprentice may be guilty of theft in taking away the goods of the maſter, tho under their immediate care: but if a man deliver goods to his ſervant, to keep or carry for him, and he carries them away with an intent to ſteal, it is not conſidered as theft, but a breach of truſt, and the ſervant is reſponſible for that as well as all other injuries to the property of the maſter.

Chapter Ninth.

OF CORPORATIONS.

CORPORATIONS are inſtituted to anſwer certain civil purpoſes. The mortality of man, rendered it impracticable to inveſt certain rights in them, for the purpoſe of preſerving that perpetual duration which in ſome inſtances, is eſſentially beneficial to civil ſociety. On this account corporations have been formed and compoſed of individuals, in whom certain rights, powers and privileges have been inveſted, and by a conſtant ſupply and admiſſion of

[p] Skin. 228.

of new members, the perpetual continuance has been ſecured, and a legal immortallity eſtabliſhed.

Corporations are called aggregate and ſole. An aggregate corporation conſiſts in a number of perſons united together in one ſociety, and are kept up by a perpetual ſucceſſion of members, ſo as to continue forever.

A ſole corporation conſiſts of one perſon only, and his ſucceſſors, in ſome particular ſtation, who are incorporated to give them that perpetuity, which as natural perſons they could not poſſeſs. I know however, of no corporation of this deſcription in this ſtate.

Corporations are divided into civil and eccleſiaſtical. Civil are inſtituted, and calculated merely for temporal purpoſes.—And eccleſiaſtical, reſpect the concerns and intereſt of religion.

This ſtate is one corporation. The counties, towns, and cities, are inferior corporations of a civil nature. The ſocieties are eccleſiaſtical corporations: private corporations, are Yale-college, the ſociety of phyſicians, and the banks of Hartford and New-London. In diſcuſſing this ſubject, I ſhall conſider I. How corporations can be created. II. Their power, capacities, and incapacities. And III. How they can be diſſolved.

I. Corporations can be created only by act of aſſembly. This power has been frequently exerciſed of late years in eſtabliſhing new counties, towns, and ſocieties. They have incorporated a ſociety of phyſicians, for the purpoſe of diffuſing medical knowledge, and they have eſtabliſhed banks to extend the benefits of commerce. The aſſembly have the power of creating ſuch corporations as they think proper, and to inveſt them with ſuch power, and priviledges as will correſpond with the deſign of the inſtitution. And ſuch corporations muſt depend upon the act of creation, for their rule of conduct. Individuals can by no aſſociation, agreement, or combination, conſtitute a corporation. They may form companies or partnerſhips, under certain names, by which they can make joint contracts, and employ their influence and property, in enlarging the ſphere of enterpriſe and activity: but they can never acquire that legal ſucceſſion of members and perpetual duration that diſtinguiſh corporations.

II. Of the powers, capacities, and incapacities of corporations.

Corporations depend for their ſpecial powers upon the act of incorporation, but there are certain incidents that neceſſarily appertain to corporations from the nature of the inſtitution. They muſt have a name, by which they are known and called, by which they ſue and are ſued, and by which they do all legal acts. In conſequence of which, they are conſidered as a collection of individuals combined into a ſingle capacity. They have only an ideal exiſtence, and in contemplation of law. Of courſe a great variety of corporations may be compoſed of the ſame perſons, with perfect conſiſtency, all which are capable of ſuing each other. Thus a town is one corporation, a ſociety within the limits of it, is another, and in a ſuit between them, the ſame perſons may be plaintiffs and defendants, in different capacities. The priviſeges of corporations are to have perpetual ſucceſſion. In all private corporations, of courſe they have the power of electing new members, as the old ones go off. To ſue, or be ſued, implead, or be impleaded, grant, or receive by its corporate name, and do all other acts as natural perſons may. To purchaſe lands, and hold them for the benefit of their ſucceſſors, and to acquire perſonal eſtate. To make bye laws, or private ſtatutes, for the government of the corporation, which are binding upon themſelves, unleſs repugnant and foreign to the deſign of the inſtitution, and contrary to the laws of the land, and then they are void. To have a common ſeal, but which however is not abſolutely neceſſary. To do all acts, make contracts, or authoriſe others to make contracts, to execute the purpoſes for which they were created.

By the common law, corporations muſt always appear in ſuits by attorney; the ſtatute law enacts, that towns, truſtees for ſchools, proprietors of common and undivided lands, grants and other eſtates and intereſt, and all other lawful ſocieties or communities, may ſue and proſecute ſuits, for the recovery of their rights, in any proper court, and may appear by themſelves, agents, or attornies, and in like manner, defend in all ſuits. In all ſuch caſes it is ſufficient notice to the corporation, to leave a copy of the writ or ſummons with their clerk, ſelectmen, or committee men, twelve

days

days before the ſitting of the court, to which the writ is returnable. In conſequence of this ſtatute, the practice has been for all corporations to appear, to proſecute and defend by agent. Tho the ſtatute ſays, that they may appear by themſelves, yet this muſt relate only to ſuch minute corporations, as will admit of the names of all the member to be inſerted in the writ; but where the names are not mentioned, and the ſuit is brought in the corporate name, it is impoſſible for the court to know the individuals: in all ſuch caſes, the appearance of courſe muſt be by agent or attorney. It is uſual to inſert the name of the agent in the writ.

The only way that a corporation can legally expreſs their minds, or do any act, is by the vote of the majority of the members legally convened, and which muſt be certified by their clerk, or ſome perſon duly authoriſed for that purpoſe, under the ſeal of the corporation, if they have one. There are however certain officers in all corporations, who are veſted with certain powers, which they can execute perſonally: but in the proper buſineſs of the corporation, they muſt meet, and the act muſt be done by the vote of the members. Thus, if a corporation commence an action, an individual cannot diſcharge or controul it, but it muſt be done by act of the corporation, or ſome perſon to whom they delegate that power. If a town have a debt againſt a perſon, it can be diſcharged only by an act of the town, and not by an individual of the town.

A corporation can neither maintain nor be made defendant to an action of battery, or ſuch like perſonal injury, for it can neither beat nor be beaten in its body politic. No action in the nature of an action of treſpaſs, will lie againſt a corporation, for they cannot in their corporate capacity commit a treſpaſs. If by an act, they direct any of their officers or any other perſon to do a treſpaſs with force, and if it be done, they may be liable in an action of the caſe, for the conſequential injury: but cannot be deemed treſpaſſers.

A corporation can commit no crime in its corporate capacity, cannot be an executor or adminiſtrator, or perform any perſonal duties, and cannot be committed to priſon, for the exiſtence being

ideal, no man can apprehend or arreſt it, but the eſtate of the corporation is liable to be taken on execution for their debts.

III. We cloſe this ſubject, with conſidering the mode of diſſolving corporations. It is manifeſt, that the legiſlature have the power of diſſolving or altering all corporations of a public nature, as counties, towns, and ſocieties, but corporations of a private nature can be diſſolved only by the death of all the members, by the ſurrendry of its franchiſes into the hands of the aſſembly, or by a forfeiture of its charter, through negligence or abuſe of its powers and privileges. In the laſt caſe, the regular mode of proceeding is, to bring an information, in the nature of a quo warranto, to enquire by what warrant, the members now exerciſe their corporate power having forfeited them by certain acts, which are pointed out in the information. The court muſt enquire into the facts, and if they are found true, and amount to a forfeiture of the charter, they may [illegible] and the corporation is diſſolved.

A SYSTEM

A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

BOOK THIRD

Of Things.

CHAPTER FIRST.

OF THE NATURAL TITLE TO THINGS.

HAVING in the preceding books entered into a minute account of the conſtitution and government of this ſtate, and the rights and privileges of its citizens, I proceed in the next place to the contemplation of Things, which are the principal objects of all political regulations. It will be amuſing to the inquiſitive mind to open theſe enquiries, by a ſlight view of the origin and foundation of property, and the method by which an excluſive title to it is acquired.

When we obſerve mankind in the uſe and improvement of the things of this world, it is manifeſt that they were created for their benefit and happineſs. The original deſign of the ſupreme author of nature, has furniſhed infallible evidence of the common right of man, to the enjoyment of the bleſſings that are placed within his reach. It is upon this original and natural principle that the right of property is founded. Antecedent to the exiſtence of civil regulations, men poſſeſſed all things in common. Every one had the power to convert to his own uſe, whatever his neceſſities required. But whenever any perſon had manifeſted a deſign, to appropriate any particular thing to his own uſe, by taking it to himſelf, he was entitled

entitled to exclude all others from interrupting him in the enjoyment of it. This is the foundation of the excluſive right of property. While mankind remained in a ſtate of nature, this principle furniſhed the only rule of conduct. While all things were in common, every one had the right of choice; but when any perſon had made his election, no other could juſtly take from him, what he had taken to himſelf. This principle is finely exemplified by the compariſon of a theatre, which tho equally open for every perſon that comes, yet the ſeat which any individual has choſen and taken, is in a proper and peculiar ſenſe his own; for the moment any place is filled, nobody has a right to remove the occupier for the purpoſe of ſeizing it for himſelf.

This taking poſſeſſion of any particular thing that lies in common, and appropriating it to one's own uſe, has by writer's on natural law, been denominated occupancy, and conſidered as the natural foundation of the excluſive right of property. Some writers contend that the right of occupancy is founded upon a tacit and implied conſent of all mankind, that the firſt occupant ſhould become the owner; and others, that the act of occupancy being a degree of bodily labor, is from a principle of natural juſtice, without any conſent, ſufficient to gain a title. This fine-ſpun reaſoning upon ſo plain a ſubject, is ſingular and unaccountable. The common right of man to things, all muſt acknowledge originates from the conſtitution of nature, without any implied conſent, or perſonal labor. The excluſive right manifeſtly depends upon the ſame principles, becauſe it exiſts prior to and independent of any conſideration of conſent or labor. A man when in the primeval ſtate of nature, he collected acorns from the trees, or killed the beaſts of the foreſts, to ſatisfy the cravings of hunger, did not enquire whether all the human race had tacitly acknowledged his right, nor did his perſonal labor meliorate the things he conſumed: but he felt that they were created for his uſe, and that he had a natural right to make the appropriation. The idea of a common right to things, includes the doctrine, that every perſon may acquire an excluſive right to a particular thing, by appropriating it to his own uſe. The neceſſary conſequence is, that the

electing

electing any particular thing, the taking poſſeſſion of it, the act of appropriation, create an excluſive title. This is the act of occupancy, and as it is the proper evidence to eſtabliſh the right, it has by a very common figure been called the right of occupancy.

When the firſt occupier abandons a thing, which he has taken, it reverts to a common ſtate, and others may take it in their turn. There are many things which periſh in the uſe; but land is capable of a temporary improvement, and we find in the paſtoral age of ſociety, that the wandering tribes, which inhabited the earth, took poſſeſſion of convenient places for the paſturage of their herds and flocks; and when they moved to other places, they were ſucceeded by other tribes, who occupied the ground in the ſame manner. While they were in actual poſſeſſion of a particular ſpot, they conſidered themſelves as having an excluſive right, and that none had a right to interrupt them in the improvement of it. Their dereliction gave to others a ſimilar right; and ſuch is the title to lands in the pure paſtoral age of ſociety. But when mankind in the progreſſive courſe of improvement, advanced to the age of agriculture, they diſcovered the advantage to be derived from a permanent title to the ground, which they cultivated. "[a] When an individual had beſtowed a portion of his labor on a "particular ſpot, and thereby rendered it more productive, than "it was in a ſtate of nature, the idea was eaſily adopted, that his "right to that ſpot did not expire with every temporary dereliction "of poſſeſſion. He was entitled to the produce in the courſe of "the ſeaſons. This led to the diviſion of lands. Then portions "were in the firſt inſtance diſtributed among the nations of the "the earth, and afterwards by a progreſſive ſubdiviſion, aſſigned "to tribes, families, and individuals.

"To effectuate the ſtill further advance of civilization, labour, "and induſtry were neceſſary: which led to a variety of inven-"tions, by which the gifts of nature were made to contribute in "a far greater degree, to the conveniences of life, than they "were capable of doing in their primitively uncultivated ſtate. "Things derived an acceſſion of value from labour, which they "had not in their primitive ſtate, and it was juſt, that the produce

"of

[a] Pow. Con. 2.

" of each man's induſtry ſhould be ſo far his own, that no other " ſhould ſhare the benefit of it, without his permiſſion. New " ideas of property then neceſſarily preſented themſelves to the " mind, whereby every one who poſſeſſed himſelf of things which " he improved by his labour and induſtry, was conſidered as having " thereby acquired a right to retain them as his own, altho they " were not neceſſary to his immediate uſe, and by which he ac- " quired the power of diſpoſing of them at his will and pleaſure " to others. This laid the foundation on which excluſive property " in moveable goods was eſtabliſhed by civil law, of which the cha- " racteriſtic is, that others are always excluded; whereas in a " communion of goods in a ſtate of nature, others are not exclu- " ded from things of which any one is poſſeſſed, except ſo long " as they are in the actual uſe of the preſent occupier.

It is evident that the power to diſpoſe of property, is one of the eſſential qualities of ownerſhip, and is founded on the nature of the right. When an individual has brought to a ſtate of cultivation, a ſpot of ground, or gathered the fruits of the earth, or caught the beaſts of the field, he has the power of exchanging them with another, and the perſon to whom conveyance is made, upon making ſatisfactory compenſation to the original proprietor, ſucceeds to his right and intereſt. It is not a mere dereliction by the firſt occupant, and the poſſeſſion, or occupancy by a ſucceſſor that transfers the right. It is the mutual agreement and conſent of the contracting parties. This power of diſpoſing of property, originates from the ſame ſource as the power of acquiring it, when it lies common to all mankind.

When a man has thus obtained an excluſive right, to particular things, with the power to retain or diſpoſe of them at pleaſure, it is to be conſidered what ſhall become of them, when death ſeparates him from all his worldly enjoyments and poſſeſſions. This involuntary dereliction of property, leaves it to be occupied by ſome other perſon, and according to the opinion of ſome writers, it naturally reverts to its original ſtate, and would be ſubject to be taken by the firſt occupant, were it not for the interpoſition of poſitive law. But this opinion cannot be well founded; for when a

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man has acquired an excluſive right to a certain thing, and added to the value of it by his own labour, it is conſonant to nature, that he ſhould determine who ſhould enjoy that property which he can enjoy no longer. Every perſon will have children, relations, or friends, with whom he is connected by the ſtrongeſt ties of affection and friendſhip. To promote their welfare, he will be prompted by the moſt powerful motives that influence the mind, and the idea, that he can appropriate the fruits of his labour, to their happineſs, will be the ſtrongeſt incentive to induſtry and perſeverance in the acquiſition of property. The exiſtence of this principle in the human mind, is ſufficient to evidence that mankind have by nature, the right of diſpoſing of their eſtate, in a manner correſpondent to their wiſhes and feelings.

The ſame principles apply in caſes where the owner has not determined, to whom his eſtate ſhall deſcend after his deceaſe. The children and relations of the deceaſed, have a natural right to the property, relinquiſhed by the death of the owner: for it is preſumed, that the deceaſed owner, would have deſired that the fruit of his induſtry, ſhould be appropriated to the benefit of thoſe with whom he was connected by the ties of conſanguinity, and this had naturally led mankind to the adoption of this practice. But the particular relations that ſhould inherit, and the mode of diſtribution, has been regulated by civil inſtitutions. It is a univerſal cuſtom among civilized nations, that the proprietor of an eſtate ſhall have the power of diſpoſing of it by will, and in caſe of his dying without a will, that his eſtate ſhall deſcend to his neareſt relations. The univerſality of the cuſtom, is concluſive demonſtration, that it is founded in the natural feelings of mankind.

a To all things, which by the nature of them, cannot be reduced to permanent property, mankind acquire a right by occupancy, ſuch are the elements of light, air, and water, in which man can have only a temporay uſe: alſo all animals of a wild and untameable diſpoſition. Theſe when taken and in his poſſeſſion, or when killed, become his property: but when wild and at liberty, they may be taken by any perſon whatever, of common right, but in all

a 2 Black. 14.

things, where permanent ownerſhip can be had, the poſitive law of ſociety ſteps in, and aſſigns a certain owner.

By nature we are led to acquire property, and by the ſame power, we are authoriſed to diſpoſe of it. But nature does not ſtop here. By this ſame principle we are as ſtrongly impelled to unite in ſociety, as we are to acquire property. Should a number of human beings be placed upon an uninhabited iſland, without laws and government, their firſt acquiſition of property, muſt be by occupancy, but they would immediately unite in ſociety, and eſtabliſh laws for the government of the community, and the regulation of property. Nature has pointed the mode of acquiring a title to earthly things, and the power of diſpoſing of them. In the moſt ſimple and uncorrupted ſtate of mankind, no particular formality was neceſſary. A verbal deed and a verbal will were equally authentic and operative with all the ſolemnity of ſigning and ſealing. But mankind in the progreſs of ſociety, diſcovered that ſuch ſimple modes of conveyance, opened the door to endleſs frauds and deceits. Hence poſitive law introduced certain forms and ceremonies, as requiſite to conſtitute a deed or will, for the purpoſe of preventing impoſition in the conveyance of property, and uncertainty, reſpecting the title. That a deed or will ſhould be in writing, and ſigned and ſealed by the party, is clearly an inſtitution of poſitive law. That man has the right to diſpoſe of his eſtate by deed, or will, is clearly the reſult of natural law.

From theſe obſervations, it appears that the laws of nature are the ground work of civil eſtabliſhment, and that poſitive inſtitutions were introduced to guard, protect, and defend the natural rights of mankind. Theſe regulations have now ſuperſeded the dictates of ſimple nature, and in the acquiſition of property, we pay no regard to them, but are wholly governed by the directions of the poſitive laws of ſociety. Theſe to counteract the fraud, and wickedneſs of individuals in different periods, during the progreſſive improvement of juriſprudence, have now become ſo numerous and complicated, that great ſkill and learning are requiſite to aſcertain the political regulations, that controul, reſtrain, and govern the conduct of the citizens of the ſtate, every day of their lives.

CHAP.

CHAPTER SECOND.

OF THE SEVERAL KINDS OF THINGS.

THE word things, is a very extenſive term, and comprehends whatever cannot be predicated of a perſon, or human being. There are many things which are ſubject to the property and dominion of man; and in that light, they are to be conſidered in this book of our enquiries.

Property in its ſtrict and literal ſenſe, is only that right and dominion, which a man has by law in things. But by a very common figure, this term is uſed to ſignify the thing itſelf, in which a man has property. The word property, therefore, ſignifies things, over which, man is in the immediate exerciſe of power and dominion. The word things is a naked deſcription without any reference, or relation to ownerſhip by man.

Things are naturally divided into *real* and *perſonal*. Things real, are permanent and ſubſtantial. They are immoveable as to place, and perpetual as to duration. Things perſonal, may properly be alſo called moveable. They are the reverſe of things real, the owner can remove them from place to place, their duration is uncertain, and they are ſubject to change and to periſh. Such is the natural diviſion of things, and it compleatly comprehends every ſpecies. But the inſtitutions of civil ſociety have made neceſſary other diviſions of property, for the purpoſe of regulating its improvement and enjoyment: and this being the point of view, in which we are to conſider things, I ſhall make ſuch diſtinctions and diviſions as have been introduced and eſtabliſhed by law. In addition to this general diviſion, we find there is a ſpecies of property denominated incorporeal, which is defined to be an ideal right, exiſting in contemplation of law, and iſſuing out of ſubſtantial, corporeal property, either real or perſonal. Perſonal things have been ſubdivided into chattels real, and chattels perſonal. Chattels real, have been defined to be a compound of real and perſonal things, poſſeſſing the immobility of the one, and the limited duration of the other, as an eſtate for years in lands, the land being immoveable, but the term to expire in a limited period. Chattles

perſonal, are compriſed in the uſual definition of things perſonal. In treating of theſe different kinds of property, I propoſe in the firſt place to conſider things real as being the moſt important to mankind. With this ſubject, I muſt conſider chattels real, becauſe they reſult from and are an appendage of real property.

In the next place, I ſhall fully explain the ſubject of perſonal property; and ſhall cloſe with a few obſervations upon things incorporeal, as they are the fruits of the other kinds of property. On this ſubject, I ſhall be very conciſe, as there can hardly be ſaid to be a neceſſity of introducing this diviſion of property into a treatiſe upon our laws; but as it is known to the common law, it may be proper to explain it, for the purpoſe of aſſiſting the reader in acquiring a knowledge of the common law.

Chapter Third.

OF THINGS REAL.

THINGS real have already been defined to be fixed, permanent, and ſubſtantial. In obſerving upon this ſubject, no better method can be pointed out, than the one adopted by Sir. William Blackſtone, in his commentaries on the laws of England. To define in the firſt place the nature of real property, in the ſecond place, the tenure, in the third, the different eſtates that may be had in it, and laſtly, the various titles to it, and the manner in which they may be acquired or loſt. This chapter will conſider the firſt of theſe diviſions and define the nature and extent of real property.

It is generally ſaid, that things real conſiſt of lands, tenements, and hereditaments. [b] Land in its legal and moſt extenſive ſignification, comprehends every kind of real property. It includes any ground, ſoil, or earth whatever, as arable, meadows, paſtures, woods, moors, waters, marſhes, furſes, and heath. It alſo in its legal meaning comprehends all houſes and buildings whatever, ſtanding on the land: for they conſiſt of two things, the ground being the foundation, and the ſtructure thereon; of courſe, if the land, or ground be conveyed, the building being annexed to it is tranſferred with it. Land

[b] Co. Lit. 4. 2 Black. Com. 17.

Land in its moſt natural and vulgar meaning, includes nothing but earth; but the law has annexed to the word this artificial meaning, by which it comprehends every thing upwards in a direct line to the heavens, and every thing downwards in a direct line to the center of the earth. No perſon has therefore a right to erect a building that ſhall hang or reach over his neighbour's land; nor to dig a mine that ſhall run under his neighbour's land. The owner of the ſurface of the ground, owns all that is over and under it,—and the conveyance of land ſimply conveys, not only the face of the earth, but all mines, woods, waters and buildings, as well as fields and meadows. It is true, that theſe particular things, excepting water, may be granted, or conveyed by their reſpective names: but nothing will paſs thereby but the thing ſpecified, and what falls literally within the meaning of the term made uſe of: but land being a general term, the conveyance of it transfers every thing annexed to it either above or below the ſurface, not only buildings, and mines, but corn, fruits, and herbage growing thereon, which are conſidered as a part and parcel of the realty till ſevered from it. So whatever is faſtened to a houſe, is conſidered as part of the realty, and paſſes with the building. It ſeems ſingular, that water ſhould paſs under the denomination of land; but the fact is, that water cannot be conveyed on account of its perpetual fluctuation, and change, and no man has any thing more than a temporary, uſufructuary property in it: but the land, or ground covered by water, is permanent and ſubſtantial, and the conveyance of it by operation of law, conveys the water that covers it. A grant of the water paſſes only a right to uſe it, or a right of fiſhing.

[c] Tenement is a word of more extenſive ſignification than land, tho generally ſpeaking it is applied only to buildings, yet in its primary and legal ſenſe, it includes every thing that may be holden, and is of a permanent nature, whether corporeal, or incorporeal.

Hereditaments by the Engliſh common law, is ſaid to be a term of ſtill larger ſignification, comprehending not only lands and tenements, but every kind of property that can be inherited, and which on the death of the owner, deſcends to his heirs, and goes not into the

[c] Co. Lit. 6.

the hands of the executor or adminiſtrator. By the Engliſh common law, certain implements of furniture, of a perſonal nature, under the name of an heir-loom, deſcend by cuſtom to the heir, together with the houſe, which being inheritable, are called hereditaments, as well as lands. But our law knows nothing about heir-looms. If we take the word hereditament according to the Engliſh definition, that is, to comprehend every thing that can be inherited—then the word would be as extenſive as the word property, becauſe every ſpecies of property by our law can be inherited: but the word has never been extended beyond the meaning of it as limited by the Engliſh law, and as we know of no perſonal property, that can come within the idea of an heir-loom, the conſequence is, that this word here can be of no larger import than lands or tenements, and whenever it is uſed in our ſtatutes, it is not intended to comprehend any thing but real property, particularly as it is uſed in the ſtatute of frauds and perjuries. As hereditament is nearly ſynonimous with other words, as it is apt to lead the mind to miſtakes concerning it, by the common law definition of it, and as there can be no neceſſity for the uſe of it, to explain our law, it muſt be conſidered as an improper and unneceſſary term, and ought to be rejected.

Chapter Fourth.

OF THE TENURE OF THINGS REAL.

WE can hardly ſay with propriety, that there is a tenure of our lands, for this ſeems to imply upon the principles of the feudal ſyſtem, a holding them of ſome ſuperior. But the truth is, that our lands are not holden of any perſon. Every proprietor has an abſolute and direct dominion in his own right in the ſoil independent of any ſuperior.

As that branch of our juriſprudence, that reſpects landed property, has never been embarraſſed with the ſlaviſh principles of the ſyſtem of feuds, it will be unneceſſary to enter into an inveſtigation of that copious and intereſting ſubject, a ſubject which has been illuſtrated and exhauſted by the labours of the greateſt literary characters

racters in the republic of letters. It would be a rich ſource of amuſement to aſcend to the origin of that ſyſtem, and trace its progreſs and variations to the preſent period. But as this is not within my plan, I ſhall confine my reſearches to a few obſervations that reſpect the laws of this ſtate.

In the ſettlement of this country, our anceſtors, as ſoon as they united in ſociety, conſidered the right to the territoy, to be veſted in the public, and proceeded to make grants to individuals. The charter of Charles II. confirmed the title of the lands, to be holden of him, his heirs and ſucceſſors, in free and common ſocage, rendering as a rent, one fifth part of the profits of all the mines of gold and ſilver, that ſhould be diſcovered in the granted territory. Socage at this time was the freeſt and nobleſt tenure in England. Such lands were ſaid to be holden of ſome ſuperior, on the conſideration of rendering a rent reduced to a certainty, and of a free and honourable kind; but as there were no mines of gold and ſilver within the territory granted by the charter, there was no actual reſervation of any rent. Of courſe, the lands were only nominally holden in ſocage, but the proprietors had in effect, an abſolute alledium. On the ſeparation of this State from the Britiſh empire we ceaſed to hold our lands by the nominal tenure of ſocage, tho in the reviſion of our laws in 1784, the ſtatute was retained, which declared the tenure to be free and common ſocage, yet as the proprietors of our lands were not ſubjected to any of the duties required of tenants in ſocage, they could never be conſidered otherwiſe, than holding allodial eſtates.

Since writing the foregoing, the legiſlature have paſſed the following act. An act declaring the tenure of lands in this ſtate.—Whereas by the charter of Charles II. the lands in the then colony of Connecticut, were holden of the king of England, by the tenure of free and common ſocage, and by the eſtabliſhment of the independence of the United States, the citizens of this ſtate, became veſted with an allodial title to their lands. Be it therefore declared, That every proprietor in fee ſimple of lands, has an abſolute and direct dominion and property in the ſame.

Chapter Fifth.

OF THE SEVERAL KINDS OF ESTATES IN THINGS REAL.

[d] AN eſtate in lands, ſignifies the intereſt that the owner has in them. Eſtate is a term common to all kinds of things, and is frequently uſed as ſynonimous with property, including the thing itſelf, as well as the intereſt the owner has in it. We have heretofore remarked, that property literally ſpeaking, was applicable only to the dominion and ownerſhip we have in things, tho by cuſtom, it is now extended to the things themſelves. Thus, eſtate properly ſignifies nothing but the kind, or quantity of intereſt, that the owner has in things, tho by cuſtom it has been extended to the things themſelves: but in our preſent enquiries, the term will be taken in its literal ſenſe.

Eſtate then may be defined to be a term importing the ſtate, condition, and circumſtances of the owner, in reſpect to his property. To obtain a preciſe idea of eſtates, we muſt conſider them in a threefold view: firſt in reſpect of the quantity of intereſt the owner has in things: ſecondly, the time ſuch intereſt is to be holden and enjoyed: and thirdly, the number and connexion of the owners.

We begin in the firſt place, to conſider eſtates in reſpect of their quantity of intereſt. This is aſcertained by their duration and extent, and the power of the owner to uſe and improve. Eſtates therefore muſt neceſſarily be of different kinds. Some are for the life of the owner, or of ſome other perſon, being as uncertain as the lives of men. Others are reduced to certainty, being circumſcribed in a limited period of time, as ſo many years, months, or days; or eſtates may be unlimited and perpetual, being veſted in the proprietor, and his heirs and aſſigns forever. The power of the owner to improve his lands, is according to the nature of the eſtate. An abſolute proprietor may improve them according to his own pleaſure, while a perſon who has a limited eſtate muſt improve it according to certain reſtrictions reſulting from the nature of it. Thus the duration of the eſtate, and the power of uſing it, determine the quantity of intereſt. The

[d] 2 Black. 103.

The moſt general and primary diviſion of eſtates, is into eſtates of freehold, and eſtates leſs than freehold. An eſtate of freehold, by our law, may be defined to be where the proprietor has a lawful right to things real, to hold and improve them for the term of his own life, and all ſuch proprietors may be denominated freeholders. Eſtates of freehold are ſubdivided into freehold-eſtates of inheritance, and not of inheritance, being for life only. The former are divided again into eſtates of inheritance, abſolute, or fee-ſimple; and eſtates of inheritance, limited or fee-tail. Eſtates not of inheritance, or for life, are divided into conventional or ſuch as are created by the act and agreement of the parties, and ſuch as are legal, reſulting from the conſtruction and operation of law. The former comprehend eſtates created by leaſes for life, and the latter where a perſon is tenant by the curteſy, and a widow is tenant in dower. Eſtates leſs than freehold are divided into three kinds. Eſtates for years, eſtates at will, and eſtates by ſufferance.

By the law of England, every owner or holder of lands, is called tenant, ſuch as tenant in fee ſimple,—fee tail,—for life, or years. This originated from a doctrine in the feudal ſyſtem, that the abſolute property of the ſoil is in the king, and that all the ſubjects hold of him, as the ſuperior lord. This properly eſtabliſhes them to be tenants. But in this ſtate, we never apply the word tenant to the owner of an eſtate in fee. He may properly be denominated the proprietor in fee, for the purpoſe of expreſſing the independent nature of our title to real property. The term tenant, has ever been applied to thoſe perſons, who having an eſtate leſs than fee ſimple, may with propriety be ſaid to hold of, or be tenants to the proprietors in fee.

No perſon is conſidered in contemplation of law, to be the owner of real property, unleſs he has a freehold eſtate. All eſtates of an inferior nature, are called chattles real, and the owners are deemed to have nothing but a uſufructuary right in the ſoil.

CHAP.

Chapter Sixth.

OF ESTATES IN FEE SIMPLE.

THIS is the largeſt and nobleſt eſtate that a man can have in real property. The proprietor is inveſted with an abſolute power to improve and diſpoſe of his lands as he pleaſes. Almoſt all our eſtates in this government are of this nature. Our anceſtors being animated with the ſpirit of freedom and equality, at the time of their emigration from England, where they had experienced the inconvenience of feudal reſtraints upon landed property, were determined to hold their poſſeſſions by the freeſt tenure, and cleareſt title. To this happy circumſtance we are now indebted for ſingular advantages and privileges. Had this country been firſt ſettled by a colony under the direction and controul of the Britiſh crown, it is probable that our lands would have been incumbered with all the reſtraints of the feudal ſyſtem, and our titles involved in the labyrinth of Engliſh juriſprudence. But as the government at firſt, granted the territory to be holden in eſtates in fee ſimple, ſo the ſubſequent conveyances have generally paſſed ſimilar eſtates. In conſequence of this, almoſt all the lands are now in the actual poſſeſſion and improvement of proprietors in fee. As we never have admitted into our code of laws, the doctrine of primogeniture, or the entailment of eſtates, our lands are diſtributed among the proprietors in that equal manner, which is favorable to the higheſt cultivation, and calls forth the greateſt exertions of induſtry. We behold Connecticut divided into well-proportioned farms, exhibiting a rapid progreſs in agricultural knowledge, and poſſeſſed by a race of reſpectable farmers, in the enjoyment of that eaſe, independence and moderate affluence, which produce the moſt permanent felicity, which falls to the lot of any portion of mankind.

To underſtand this ſubject, we muſt explain the meaning of fee ſimple. The term fee is derived from the law of feuds, which was eſtabliſhed in Europe by the conquerors of the Roman empire. [e] In the diviſion of the lands by thoſe conquerors, two kinds of eſtates were granted, which were diſtinguiſhed by the name of feud, and allodium. Feud, fief, or fee, may be defined to be an eſtate in lands, holden by a tenant of ſome ſuperior lord, and granted to him originally

[e] Mill. Eng. Gov. 75. 2 Black. 44.

ginally as a ſtipend or reward for ſervices done, and were to be holden on condition of performing further ſervices, which rendered it a conditional eſtate. Such eſtates were granted to the vaſſals of the chiefs and leaders who made conqueſts of parts of the Roman empire. Allodium, or alleud, may be defined to be an abſolute eſtate in the proprietor, holden unconditionally and independent of any ſuperior. Such eſtates were granted to the freemen of the nations, who attended the northern conquerors in their ſucceſsful expeditions. Theſe eſtates were however converted into feuds, which in the progreſs of ſociety underwent an infinite variety of changes, and gave birth to that intricate ſyſtem of juriſprudence, reſpecting landed property, which has ſo long employed the reſearches of the lawyer and antiquarian.

To hold lands in fee, according to the primary meaning of the term, was to hold of ſome ſuperior, upon condition of rendering certain ſervices, while the ultimate property of the ſoil reſted in the ſuperior. *f* But in England this term is not now uſed in its primary ſenſe. A fee is defined to be an eſtate of inheritance, being the higheſt intereſt that a man can have in lands. When the word fee is uſed without any addition, or with the addition of the word ſimple, it is oppoſed to fee conditional, or fee-tail, and denotes an unconditional, unlimited eſtate, transferable at pleaſure, and deſcendible to the heirs general. Such is the meaning of this term, as uſed in our laws. But conſidering the nature of the tenure of our lands, we may with propriety ſay that fee is ſynonymous with allodium, and in this light it will be contemplated in our enſuing enquiries.

The incidents to eſtates in fee ſimple are, that the proprietor has the power to transfer, and deviſe them to whom he pleaſes, that they deſcend to his heirs generally, according to the ſtatute law, in caſe no diſpoſition is made by will, that he is accountable to no perſon for their uſe and improvement, and may commit waſte, or do any act which he pleaſes.

g The fee ſimple in all lands reſts and reſides at all times in ſome perſon. This being the largeſt poſſible eſtate, it comprehends all inferior and leſſer eſtates into which it may be divided. If a pro-

f 2 Black. 106. *g* 2 Black. 107. Co. Lit. 342.

prietor in fee makes a leaſe for years, the freehold remains in him, and his heirs, and the leſſee has only a temporary eſtate, inferior to a freehold, and at the expiration of the leaſe, the land reverts to the grantor in fee. An eſtate of freehold in fee ſimple, may be divided and carved out into all the inferior and leſſer eſtates, and on the expiration of ſuch eſtates, the lands revert to the proprietor in fee. The fee ſimple of lands is ſometimes in abeyance, in remembrance in law, there being no perſon in exiſtence, where it can actually veſt: yet it exiſts in idea, and veſts in the proper owner whenever he appears. Thus for example, in a grant to one man for life, and then to the heirs of another forever, it is evident that the fee ſimple is not in him, who has the eſtate for life, and the heirs of the other can never be known till his death, for nobody is the heir of the living, therefore there is no perſon in being who has the fee ſimple, of courſe it remains in abeyance.

[b] It is a general rule of law, that to create an eſtate of inheritance by deed, it is neceſſary to uſe the word heirs, and that no circumlocution, or other words, will ſupply the want of that word. A conveyance to a man and his aſſigns forever, tranſfers only an eſtate for life. [i] This general rule however, does not operate in deviſes; for theſe having been introduced at a later period, their conſtruction has been more liberal. If the deviſe contain words that ſufficiently evidence an intention in the deviſor to tranſmit an abſolute, perpetual eſtate, then the intention of the deviſor ſhall be purſued, and the deviſee ſhall take an eſtate of inheritance. Thus a deviſe to a man forever, to one, and his aſſigns forever, or to one in fee ſimple, will veſt an eſtate of inheritance in the deviſee, becauſe the words ſufficiently evidence ſuch an intention in the deviſor, tho he does not uſe the word heirs. But a deviſe to a man, and his aſſigns, without annexing words of perpetuity, tranſmits only an eſtate for life.

[k] In grants of lands to corporations, the word, heirs, is not eſſential, becauſe corporations have no heirs, but the word, ſucceſſors, ſeems to be the proper term, denoting the ſame relation between corporate perſons, as the word heir, and anceſtor, between natural perſons; therefore in grants to corporations, ſucceſſors uſually ſupply

[b] 2 Black. 107. [i] Ibid. 108. [k] 2 Black. 109.

ſupply the place of heirs ; but this is not neceſſary, becauſe, tho a grant to a corporation without words of perpetuity, will create only an eſtate for life, yet as a corporation never dies, an eſtate for life muſt be as large as they can poſſibly take. Of courſe, a ſimple grant to a corporation, conſtitutes a perpetual eſtate equivalent to a fee ſimple.

Chapter Seventh.

OF ESTATES IN FEE-TAIL.

ESTATES in fee-tail, are where the lands are limited to ſome particular heirs, and do not deſcend to the heirs in general. To explain this ſubject clearly, it is neceſſary to recur to the Engliſh law, and deduce the origin of theſe eſtates.

At common law eſtates in fee ſimple were of two kinds. Fee ſimple abſolute, which we have conſidered in the preceding chapter, and fee ſimple conditional, which we are now to conſider. A conditional fee was reſtrained to ſome particular heirs, in excluſion of others, as a limitation to the heirs of a man's body, which admitted lineal, and excluded collateral heirs : or to the heirs male of a man's body, which excluded collateral and female lineal heirs. But to all eſtates of this kind, a condition was either expreſſed, or implied, that if the donee died without ſuch particular heirs, the land ſhould revert to the donor. The eſtate therefore, was a fee ſimple, on condition that the donee had iſſue. When the grantee had iſſue born, the performance of the condition veſted in him an abſolute eſtate, with power to alien, ſo as to bar his own iſſue, and the reverſion to the donor, and to charge it with certain incumbrances, bining on his iſſue, and ſuch eſtates were then ſubject to forfeiture for treaſon. But if no alienation was made by the donee, then in default of ſuch heirs as were deſcribed in the deed, the land at any future period would revert to the donor, becauſe no heirs could take by deſcent, only thoſe to whom the eſtate was limited. It therefore became the practice for the grantees, as ſoon as the condition was performed by the birth of iſſue, to alien to ſome friend, and then inſtantly repurchaſe, and take back a conveyance, which rendered the eſtate a fee ſimple abſolute, defeated the condition, barred the

1 Co. Lit. 19. 2 Black. Com. 110. 2 Inſt. 333.

the reverſion to the donor forever. But the nobility diſcovering that this practice defeated them of their reverſions, and prevented them from perpetuating their eſtates in their families, procured to be paſſed in the reign of Edward I. the celebrated ſtatute of Weſtminſter the ſecond, which enacted, [m] that the will of the donor as expreſſed in the deed, ſhould be obſerved, and that the donee ſhould not on birth of iſſue, alien the eſtate: but that the ſame ſhould remain to his heirs, if he had any, and on failure, ſhould revert to the donor, or his heirs. In conſtruction of this ſtatute, the judges determined, that the donee had not a conditional fee, but they divided ſuch eſtates into two parts, leaving to the donee a new kind of eſtate, which they denominated fee-tail, ſignifying a limited eſtate, and veſting in the donor, the ultimate fee ſimple of the land, expectant on the failure of the iſſue, which is called a reverſion.

Theſe eſtates are divided into general and ſpecial. Tail general is where lands are given to one and the heirs of his body begotten, which allows his iſſue by every marriage to inherit the eſtate. Tail-ſpecial, is where the eſtate is reſtrained to certain heirs, as the heirs of his body, on Mary his now wife to be begotten, which excludes iſſue by any other marriage. Theſe are ſubdivided into tail-male, and tail-female, both which may be general and ſpecial, for the purpoſe of diſtinguiſhing the ſexes, to whom they are limited to deſcend. The word heirs in the donation, is neceſſary to create a fee, and ſome words of inheritance or procreation, are neceſſary to make a fee-tail, as heirs of his body, or heirs of his body, to be begotten on his wife. The omiſſion of his heirs can be ſupplied by no other word, and ſuch deed will transfer only an eſtate for life.

The entailment of eſtates being found extremely inconvenient, and detrimental to the public, by aggrandiſing particular families and preventing the free transfer and alienation of landed property, every poſſible method was deviſed to exonerate it from theſe reſtraints. The colluſive fictions of fines and common recoveries, were introduced for the purpoſe of docking entailments, and became a very common mode of conveyance in England. Statutes were made at different periods, which ſubjected eſtates in tail to forfeiture

[m] 2 Inſt. 333.

forfeiture for treaſon, made them chargeable for debts due to the king, and liable to be ſold for debts contracted by a bankrupt tenant.

The incidents to eſtates-tail, by the law of England, are that the tenant may commit waſte, his wife ſhall have her dower, the huſband of a female tenant in tail, may be tenant by the curteſy, and that an eſtate tail may be barred, or deſtroyed by lineal warranty, deſcending with aſſets to the heir.

In this ſtate, it has been ſuppoſed by ſome, that the Engliſh law reſpecting the entailment of eſtates was in force. Eſtates of that kind have been created, and common recoveries have been ſuffered. But this was an erroneous opinion. [a] Our courts have never recognized the doctrine of conditional fees at common law, [o] and have never admitted of eſtates in fee-tail. A ſtatute has lately been paſſed in affirmance of a principle of common law, adopted and eſtabliſhed by the courts of judicature. [p] By this ſtatute it is enacted— "that no eſtate either in fee ſimple, fee tail, "or any leſſer eſtate, ſhall be given by deed, or will, to any per-"ſon, or perſons, but ſuch as are in being, or to the immediate "iſſue or deſcendants of ſuch as are in being, at the time of mak-"ing ſuch deed or will. And that all eſtates given in tail, ſhall "be and remain an abſolute eſtate in fee ſimple, to the iſſue of the "firſt donee in tail." Such is now our ſtatute law, and ſuch has ever been our common law. Here we have the pleaſure to obſerve that the transfer of our lands, is not fettered and burdened by the reſtrictions and incumbrances, with which they are perplexed and embarraſſed in England; and that we have no occaſion to acquire a knowledge of this branch of their juriſprudence, only to explain ſome terms that have been borrowed from it, and introduced into our own.

In conſtruction of this ſtatute, it may be obſerved, that all deeds or wills, that contain the words of limitations uſed in England, veſt an eſtate in fee-tail in the firſt donee, and a fee ſimple abſolute, in his iſſue or deſcendants. All ſuch eſtates therefore during the life of the firſt donee, partake of the legal qualities of ſuch eſtates in England, but have a total different operation after his death

[a] Kirb. 118. [o] Hil. 175. [p] Statutes. 3.

death. To create an eſtate-tail, by our ſtatute there muſt be ſome words of inheritance, or procreation made uſe of—as heirs of his body—otherwiſe, it will be a fee ſimple. All gifts in the form preſcribed by the law of England, to create an eſtate-tail, will create one by our law.

The firſt donee, or tenant in tail, cannot alien for a longer time than his own life, ſo as to bar the iſſue, or the reverſion. The policy of this regulation by our ſtatute is apparent. The father may diſcover in his ſon, marks of prodigality and profuſion, that would render it unadviſeable to veſt him with the abſolute property of lands. By this mode, he may make a ſafe proviſion for him during his life, and prevent him from running into extravagance, by depriving him of the power of ſquandering away his property; and the limiting of an eſtate for a ſingle life, is not productive of the inconveniences of perpetuities. Tenant in tail, cannot do any act by which he can make the lands chargeable with his debts, after his deceaſe.

It is not in the power of the firſt donee in tail, to do any act by which he can become inveſted with a fee ſimple, and defeat the iſſue or reverſioner. As the ſtatute has expreſsly authoriſed the proprietor in fee, to carve out ſuch an eſtate, it precludes the exiſtence of a power to defeat it. It therefore may be eſtabliſhed as a general principle, that fines and common recoveries, or any mode that has been adopted in England, cannot be introduced here, to dock ſuch entailments as are warranted by ſtatute. To allow ſuch a power would be defeating the humane and beneficial intentions of the law. It would prevent a father from making ſuitable proviſion for the ſupport of a prodigal ſon during life, becauſe it would allow the ſon a power to inveſt himſelf with an abſolute eſtate in the lands conveyed to him for life, and by ſquandering it away, defeat the benevolent deſign of a parent, and diſinherit his own offspring.

In England, common recoveries were introduced to unfetter the perpetual entailment of eſtates, which reduced the nation to ſlavery, and diſcouraged induſtry and agriculture. But as in this ſtate

we admit only of an entailment for a ſingle life, which is dictated by ſound policy, and produces none of the miſchiefs of perpetuities, it is manifeſt that no method can be allowed to defeat it.

Upon a failure of iſſue of the firſt donee in tail, the land ſhall revert to the donor, or on his deceaſe to his heirs, and ſhall not veſt in the collateral heirs of the donee. But if the donee die, leaving ſundry children, the eſtate will veſt in the particular heir or child to whom it is limited.

As our ſtatute has borrowed the deſcription of an eſtate from the Engliſh law, it neceſſarily recogniſes all the incidents that reſult from the nature of it. The incidents then to an eſtate in tail, are the four following.

1. The firſt donee, or tenant in tail, may commit waſte on the land by felling timber, pulling down houſes and the like, without being impeached, or called to account therefor, in as ample a manner as proprietor in fee can do. 2. The wife of the firſt donee ſhall have her dower, or thirds in the eſtate tail. 3. The huſband of a female tenant in tail, may be tenant by curteſy of the eſtate-tail. 4. An eſtate tail, may be barred, or deſtroyed by lineal warranty, deſcending with aſſets to the iſſue of the firſt donee, that is, if ſuch donee alien in his life time, with warranty, and then leaves ſufficient eſtate, which deſcends to the heirs, to make good the warrnty, by which they would be liable on the covenants of warranty, in caſe of an eviction of the purchaſer of the eſtate-tail, then ſuch heirs ſhall be barred of a recovery of ſuch eſtate, ſo aliened by their anceſtor: becauſe it would be an abſurdity to allow them to recover the lands of the purchaſer, and then make them liable to pay back to him the value of it, upon an action brought againſt them upon the covenant of warranty.

But it is probable that all our learning reſpecting eſtates in fee-tail, will ſoon go into diſuſe; for in conſequence of the reſtriction of the ſtatute, all the purpoſes of a conveyance allowed by it, may be anſwered by a perſon's making a gift to a man for life, and then to the heirs of his body forever, or any particular heir, which

is all that can be done by an eſtate tail, and in this caſe the donee is tenant for life, inſtead of tenant in fee-tail.

Chapter Eighth.

OF ESTATES FOR LIFE.

ESTATES for life, are freehold eſtates, not of inheritance, and there are three kinds known by our law. The firſt is created by the act and agreement of the parties. The other reſult from the operation of law, and are where a man is tenant by curteſy, and a woman tenant in dower.

I. [g] Eſtates for life created by the act of the parties, are, where a man by deed, deviſe, or leaſe, grants lands to another, to hold for the term of his own life, or for that of any other perſon, or for more lives than one. Where the grant is to a man for his own life, he is called tenant for life: where the grant is to a man for the life of another, he is called tenant for another's life. The moſt uſual method of creating eſtates for life, are by leaſe: but they may be created not only by expreſs words, but by a general grant without deſcribing any eſtate. As where a man grants lands to another, without ſpecifying any eſtate, or heirs; this makes him tenant for life, for as no words of inheritance are inſerted in the deed, it cannot be conſtrued to be a fee; but the eſtate ſhall be conſtrued to be as large as the words in the deed will warrant, and therefore if the grantor have authority to make ſuch a grant, it ſhall be conſtrued to be an eſtate for the life of the grantee.

All eſtates for life, are generally conſidered to endure for the life of the perſon to whom they are granted. There are however, ſome eſtates for life, dependent on future contingences, which may be determined before the life for which they are created, expires. As where a man has an eſtate given to him for the life of another, or a woman during her widowhood, when the perſon for whoſe life the land is holden, dies, or the widow marries, the eſtates are determined and gone; yet while they continue, they are deemed

[g] 2 Black. Com. 120. Co. Lit. 41.

deemed to be eſtates for life, becauſe their duration is uncertain, and they might poſſibly have endured for the life of the tenant.

The incidents to eſtate for life are. 1. Tenant for life, when he is laid under no reſtrictions in the deed by which he holds, may of common right take from the land neceſſary wood to repair or burn in his houſe, to make or repair inſtruments of huſbandry, and to make and repair neceſſary fences on the land. By the common law he has right to improve the land in the ſame manner as tenant in fee, without impeachment of waſte; and if he commit waſte, no action will lie againſt him, and this ſeems to be the diſtinction adopted in the law, that where an eſtate is created by act of the parties, the tenant cannot be impeached of waſte, becauſe it is in the power of the grantor to ſecure his intereſt, and lay the tenant under proper reſtraints by the deed that creates the eſtate; but where eſtates for life reſult from conſtruction of law, the tenant ſhall be reſtricted from the commiſſion of waſte, and if he do waſte, ſhall be liable to an action, becauſe it never was in the power of the heir in intereſt, by a contract, to limit or reſtrict the tenant in the uſe of the land. It is therefore neceſſary for every perſon when he grants an eſtate for life, to reſtrain the tenant by the deed from the commiſſion of waſte. But in England, by the ſtatute of Gloceſter, tenants for life, as well as years, are liable to an action of waſte. Such is the common law, as ſtated by Coke, and Blackſtone, [r] but Reeve contends, that tenant for life, was puniſhable for waſte by the common law.

2. [s] Tenant for life, ſhall not be injured by any ſudden and unexpected determination of the eſtate, becauſe the determination is contingent and uncertain. It is a general rule, that in all caſes where the determination of an eſtate for life is dependent on a contingence, if it be determined by the act of God, or the act of the law, the tenant, unleſs the eſtate be determined by his death, and then his repreſentatives, ſhall have the emblements, or profit of the crops growing on the land at the time the eſtate is determined: but if the eſtate be determined by the act of the tenant, the emblements ſhall go to the proprietor in fee. If a tenant for life ſows the land, and dies before harveſt, his executor ſhall have

[r] See vol. ii. 83. [s] 2 Black. Com. 122. Co. Lit. 55.

the emblements or profits of the crop: for the eſtate was determined by the act of God, and it is a maxim of law, that the act of God does no man an injury. The repreſentatives, therefore ſhall have the emblements to compenſate for the expenſe of ſowing, and as an encouragement to huſbandry, which would be diſcouraged in all eſtates of uncertain duration, if the tenant could not know with certainty, to whom the profits of his labour would go. If a man be tenant for the life of another, and he, on whoſe life the land is held, dies after the corn is ſown, the tenant ſhall have the emblements. So if a leaſe be made to huſband and wife during marriage and the huſband ſows the land, and afterwards they are divorced, by which the eſtate is ended, the huſband ſhall have the emblements, becauſe the divorce is the act of the law. If a tenant during widowhood, thinks proper to marry, ſhe determines the eſtate by her own act, and ſhall not have the emblements. The doctrine of emblements extends to all corn ſown, roots planted, and every thing that yields an annual artificial profit, in conſequence of the labor of the tenant; but does not extend to fruit, trees, graſs, and the like, which are not planted annually at the expence, and labour of the tenant, but are either the permanent, or natural profits of the earth.

3. [r] If tenants for life leaſe out their eſtates to under-tenants, they ſhall enjoy all the privileges of the tenants for life, and in addition to them, ſhall not be prejudiced by the determination of the eſtate, by the act of the tenant for life, but in all ſuch caſes they ſhall be entitled to the emblements; as if a tenant during widowhood marries, and determines the eſtate, yet the under-tenant ſhall have the emblements.

II. [s] Tenant by the curteſy, commonly called the curteſy of England, reſults from conſtruction and operation of law, and is defined to be where a man marries a woman poſſeſſed of a freehold eſtate of inheritance, and has iſſue by her, born alive, capable of inheriting the eſtate, that in ſuch caſe he ſhall on the death of the wife, hold the eſtate for his own life. To conſtitute this eſtate, the requiſites are, that there be a lawful marriage, that the wife be actually poſſeſſed of the lands, and not have a mere right to poſſeſs,

ſo

[r] 2 Black. Com. 123. [s] Ibid. 126. Co. Lit. 29.

ſo that a man cannot be tenant by curteſy of a remainder; that iſſue be born alive, that might by law inherit, that it be born during the life of the mother, and not be delivered by the Cæſarean operation, and that the wife be dead.

The reaſon why this kind of eſtate is ſo denominated, is ſaid by Littleton to be becauſe it was in uſe only in England: but it appears by other writers to have been eſtabliſhed in other countries. The origin of it is attributed by Blackſtone to the feudal law, and ſeems to have been derived from this principle, that if a man marries a woman poſſeſſed of lands and has children by her, as he is the natural guardian of the children, it is reaſonable that he ſhould have the uſe and improvement of the land, to ſupport and educate them. On the birth of iſſue his title commences, and the law will not defeat it by any ſubſequent event.

This eſtate is founded upon a ſingular principle, the capacity of the parents to have children, and the circumſtance of their being born alive. It would be more rational to ſay, that the huſband ſhould hold during life, the lands of the wife after her death, whether they had iſſue or not, or that he ſhould hold them, in caſe the iſſue ſurvived her, and it was neceſſary to have the improvement of the lands for their education and ſupport: But that the circumſtance that the child be born alive, whether it live one moment or not, ſhould be the event, on which the eſtate depends, is one of thoſe unaccountable whims, which are ſometimes adopted by accident, and continued by the authority of precedent. It is ſtill more extraordinary, that the huſband ſhould be defeated of the eſtate, if the child be delivered by the Cæſarian operation: for there is preciſely the ſame reaſon, why the father ſhould have the eſtate of the mother for the education of children delivered by this mode, as by the common mode.

As incident to this ſpecies of eſtate, the tenant may of common right, take from the land, neceſſary wood to repair, or burn in his houſe: to make and repair fences and inſtruments of huſbandry: for he has a right to the uſe and enjoyment of the land, and all its profits, during the continuance of the eſtate. But he is not permitted to cut down timber, or do any other waſte, which is a perma-

nent

nent injury to the ſoil, and unneceſſary to take the temporary profits of the eſtate. [w] And if ſuch tenant commit waſte, he is liable to the heir in an action of waſte at common law.†

In reſpect of emblements, and under tenants, the ſame rules apply in caſes of tenants by curteſy, as tenants for life.

III. Tenant in dower, is where a widow is endowed of one third part of the real eſtate her huſband died ſeized of, during her life.

In the conſideration of this ſpecies of eſtate, it will be proper to point out, who ſhall be endowed, of what ſhe ſhall be endowed, the manner how dower ſhall be aſſigned, and how it may be barred or prevented.

1. The perſon entitled to dower, or as it is commonly expreſſed, to thirds, is deſignated by the ſtatute concerning the dowry of widows, which enacts, [x] that every married woman, living with her huſband in this ſtate, or abſent elſewhere from him by his conſent, or through his mere default, or by inevitable providence, or in caſe of divorce, where ſhe is the innocent party, that ſhall not before marriage be eſtated by way of jointure, ſhall immediately upon and after the death of her huſband, have right, title, and intereſt, by way of dower, in and unto one third part of the real eſtate of her deceaſed huſband, in houſes and lands, which he ſtood poſſeſſed of, in his own right, at the time of his divorce, to be to her during her natural life. This ſtatute makes proviſion for widows generally, and in one inſtance is ſo complaiſant to the female ſex, as to entitle a woman to dower in the lands of a man not her huſband at his deceaſe. This happens in the caſe of a divorce, where the woman is the innocent party. The divorce operates as a compleat diſſolution of the marriage contract, yet the humanity of the law, will not permit a man to abuſe his wife in ſuch a manner, as to compel her to obtain a divorce, and thereby defeat her of her dower. On this ſtatute a curious queſtion may ariſe—Suppoſe a woman being the innocent party obtains a divorce, and both are again married, and then the man dies,

[w] Rofe vs. Hays, S. C. 1791. [x] Statutes, 42.

† This deciſion of the ſuperior court adopts the doctrine of common law, laid down by Coke—but a contrary opinion is maintained by Reeve, in his hiſtory of the Engliſh law. See Vol. ii. 83.

dies, ſhall his lawful and divorced wife, both be endowed of his lands? Can a woman having one huſband, be endowed of the lands of a former huſband? Upon a literal conſtruction of this ſtatute, theſe queſtions muſt be anſwered in the affirmative.

It ſeems to be a neceſſary conſtruction of the ſtatute, that a woman is not entitled to her dower, when ſhe abſents herſelf from her huſband wilfully, without juſt cauſe, and continues to be abſent unneceſſarily until his death. Such conduct, being an open infraction of the marriage contract, a forfeiture of the right of dower, is a proper puniſhment, and will operate as an additional inducement upon women, to pay a proper attention to their huſbands, in the hour of ſickneſs and diſtreſs. Tho the ſtatute does not expreſs this, it fairly implies it. A woman ſhall be endowed when abſent without a fault of her own; if her abſence be owing to her own fault, it follows that ſhe loſes her dower.

y By the common law, a woman muſt be more than nine years old, at the deceaſe of her huſband, to be endowed of his lands.

2. A woman is to be endowed by the ſtatute, of all the houſes and lands, her huſband was poſſeſſed of in his own right, at the time of his deceaſe; but has no claim upon lands aliened by him in his life time. By the common law, the wife had her dower in all the lands her huſband ever owned, tho he had transferred them. This inconvenient encumberance, on the alienation of real property, is repugnant to the policy of our laws, and has never been introduced.

z A queſtion has ariſen, whether by the ſtatute, the widow has a right upon the death of her huſband, to enter immediately into the actual occupancy of her thirds, in the real eſtate of which he died ſeized, in common with the heirs, or whether ſhe has right only to have dower aſſigned, and till that is done, has no right to enter and occupy. It has been decided by the ſuperior court, and the judgment affirmed by the ſupreme court of errors, that one third of the real eſtate, of which the huſband dies poſſeſſed in his own right, immediately veſts in the widow for life, in common with the heirs, before aſſignment, and does not depend upon being

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y 2 Black. Com. 130. *z* Calder & wife, vs. Bull, 3 C. Errors 1794.

ſet out, any more than the right of an heir depends upon the diſtribution of the eſtate; and that the diſtribution only ſevers the right which was as compleat before as after.

3. The mode of endowing a widow, is deſcribed by the ſtatute. "[a] That if the perſon, or perſons that have by law a right to inherit the eſtate, do not within ſixty days after the death of the huſband by three ſufficient freeholders of the the ſame county, to be appointed by the judge of probate, in whoſe diſtrict the eſtate lies, and ſworn for that purpoſe, ſet out and aſcertain ſuch right of dower, that then ſuch widow may make complaint to the judge of the court of probate in whoſe diſtrict the eſtate lies, which judge ſhall order and decree, that ſuch woman's dowry ſhall be ſet out and aſcertained by three ſufficient freeholders of the county, who ſhall be ſworn, faithfully to proceed and act therein according to their beſt ſkill, and the ſaid dowry being aſcertained and ſet out, in either of the methods aforeſaid, and upon approbation thereof by ſaid judge, ſuch dower ſhall remain fixed and certain, and all perſons concerned therein ſhall be concluded thereby." [b] A ſubſequent ſtatute, has veſted this power in the court of probate, who has probate of the will, or the power of granting adminiſtration on the eſtate.

4. A woman may be debarred of her dower by elopement, or wilful abſence from her huſband, or by accepting a proviſion made for her by her huſband, in his will in lieu of dower. A woman is not compellable to accept of ſuch proviſion, but may refuſe it and take her dower at law. If ſhe accept ſuch proviſion, ſhe is bound thereby, and her dower is diſcharged. [c] But the dower of a widow is not barred by lapſe of time. It is a charge upon her huſband's eſtate, which no alienation of heirs, or creditors can defeat.

A woman that has been eſtated by way of jointure, before her marriage, is by ſtatute barred of dower. This is all that our ſtatute law ſays reſpecting jointures. We muſt therefore have recourſe to the common law, for the explanation of a word recognized by the ſtatute. [d] A jointure, may be defined to be an eſtate in

[a] Statutes, 42. [b] Ibid. 486. [c] Crocker vs. Fox, S. C. 1795.
[d] 2 Black. Com. 137.

in lands for the life of the wife, at leaſt competent for her livelihood, to take effect in profit or poſſeſſion, preſently after the death of her huſband. The title to the lands conveyed as a jointure muſt be valid, or it will not bar dower. If a jointure be made after marriage, the woman at the death of the huſband may accept it, or refuſing it, may have recourſe to her dower at law. The word jointure originally ſignified, a joint eſtate to the huſband, and wife, but extends alſo to an eſtate limited to the wife only. A jointure therefore may be created by any form of conveyance, that ſecures to the wife, the uſe or improvement of lands, for her life at leaſt, and which ought to be expreſſed, to be in lieu of all her dower, and not of any particular part of it.

Jointures originated in England from the introduction of uſes, by which one perſon had the uſe and another the property and poſſeſſion of lands. As a woman could not be endowed of a uſe, jointures were invented, by which lands were conveyed to the joint uſe of huſband and wife, during their lives. As uſes have never been generally introduced into this ſtate, the making of jointures has not become a common practice.

As to the incidents of this ſpecies of eſtate, they are the ſame as in tenancy by the curteſy. [e] But in addition to the liability of the tenant, to an action at common law, for the commiſſion of waſte, the ſtatute has provided—that every widow endowed of lands and houſes, ſhall maintain all ſuch houſes, buildings, fences, and enclоſures, as ſhall be aſſigned, and ſet out to her in dower, and ſhall leave the ſame in good and ſufficient repair, and on failure thereof, the county court in the county where the eſtate is, on application made, may deliver ſo much of the ſaid houſes, and lands to the next heir of the ſame, as they ſhall judge to be ſufficient, out of the rents and profits of the ſame, to repair ſuch defects, unleſs ſuch widows will give ſufficient ſecurity for leaving the ſame in good repair.

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[e] Statutes, 43.

Chapter Ninth.

OF ESTATES FOR YEARS.

ESTATE for years, or tenant for years, is where a man has the uſe and poſſeſſion of lands, by a contract with the proprietor for a certain and determinate period. The method of creating ſuch eſtates, is by leaſe, and the parties are denominated leſſor and leſſee. They are a middle kind of eſtate, between an eſtate for life and a tenancy at will. Let the period be ever ſo ſhort, or long, yet in contemplation of law, it is deemed an eſtate for years, a year being the ſhorteſt period the law regards. Thus where a perſon has a leaſe of lands for three months, the law reſpects him as tenant for years, tho he can improve the lands no longer than the period limited in the leaſe. So a leaſe for a thouſand years, is conſidered only as an eſtate for years, and the leſſee has only a chattel intereſt, which by the common law, goes into the hands of the executor or adminiſtrator after his deceaſe. The eſtate of ſuch leſſee, is not a freehold, while a perſon who has an eſtate for life, is conſidered as a freeholder, tho in the ordinary courſe of things it is not poſſible that ſuch eſtate ſhould ſubſiſt for ſo long a period, as the former. The reaſon of this diſtinction will be eaſily comprehended from a conciſe view of the origin of leaſes.

In the early periods of the Engliſh government, a leaſe for years was of ſmall account, and was not permitted to extend beyond the term of forty years. They were made uſe of by the lords of manors, for the purpoſe of improving and cultivating the large tracts of territory, which they owned. To anſwer this purpoſe, ſhort leaſes were as effectual as long, becauſe the parties might renew them as often as they pleaſed. Theſe leaſes for years, were at firſt under the power and controul of the proprietors of the lands, and might be defeated by a feigned recovery or conveyance, which rendered them for a period ever ſo long, a precarious and uncertain intereſt. In the reign of Henry VII. it was determined that leaſes for years ſhould not be defeated by feigned recoveries, and untrue conveyances, but that the leſſee ſhould hold and recover poſſeſſion of the land. This introduced leaſes for long terms, and they were uſed for the purpoſe of borrowing money upon them

f 2 Black. Com. 140. Co. Lit. 44.

them, as well as for many other purpoſes, different from the original deſign of leaſes. When the term for which ſuch leaſes could be made, was enlarged, theſe eſtates were conſidered of the ſame nature and ſubjected to the ſame regulations as leaſes for ſhort periods. It would have been extremely inconvenient to have adopted different rules for long and ſhort terms. They were all eſtates for years, and of courſe of the ſame nature, and it would have been difficult to fix upon a particular period, or number of years that ſhould divide between eſtates for years, and freeholds. It was therefore neceſſary to apply the ſame rules to all eſtates for a certain determinate number of years, however different their period of continuance might be. Such eſtates therefore are deemed inferior to freeholds, and are contemplated as chattels real.

In conſequence of the inferiority of eſtates for years, to freeholds, they may be created to commence in future, that is, a leaſe to commence in three months, or by a certain day, is good. But the conveyance of a freehold eſtate, muſt take inſtant effect, and if the eſtate be to commence in future, it will be void. This doctrine depends upon the old common law principle, that livery of ſeiſin, or delivery of poſſeſſion is neceſſary to paſs a freehold, which muſt be done to take inſtant effect, and not to operate in future. But eſtates for years, being leſs than a freehold, no delivery of poſſeſſion was neceſſary to paſs them, and of courſe they might be created to commence in a future time: but where a freehold eſtate in remainder, was dependent on an eſtate for years, livery of ſeiſin muſt be made to the tenant for years, to paſs the freehold to the remainder man. The tenant for years, on this principle is not ſaid to be ſeized of land, he has no property in the ſoil, he has nothing but a right to uſe and improve for a certain term, which is called his intereſt in the term. This gives him a right of entry upon the land. And then he becomes poſſeſſed of the term for years. The legal ſeiſin remaining in the proprietor in fee. Hence the word term not only ſignifies the time of the leaſe, but the intereſt of the leſſee.

By the common law, the actual entry of the leſſee was deemed neceſſary to render the leaſe compleat: but this is unneceſſary by our laws; and as ſoon as the leſſee has obtained a leaſe, he there-

by acquires the right of entry, in caſe the leſſor be in poſſeſſion, or has the right of entry.

Every ſtate for years, by whatever words created, muſt have a certain, a determinate period to commence and terminate. There muſt therefore at the time of making the leaſe, be ſome time aſcertained by the expreſs agreement of the parties, or a reference to ſome collateral act reducible to a certainty, which will fix the commencement and termination of the eſtate, or it will be void. Thus a leaſe to one perſon for ſo many years as another ſhall live, is void, for the term is uncertain, and can never be reduced to a certainty during the time of the leaſe: but a leaſe for ſo many years, as a particular perſon ſhall name, is good, becauſe when he has named the number of years, the period is certain, and he is referred to by the parties, as the collateral thing to aſcertain the period. A leaſe for twenty years, if a particular perſon named ſhall live ſo long, is good, becauſe here is a certain period determined, beyond which the leaſe cannot poſſibly extend, tho it may ceaſe at an earlier period, upon the death of the perſon named. If a leaſe have a falſe or impoſſible date, or no date, it takes effect from the delivery; but where the time limited for its commencement is uncertain, it is void.

In reſpect to the incidents of this ſpecies of eſtate, it is clear, that all leſſees for years, as well as proprietors in fee, and freeholders, may make leaſes for years. A leſſee for years may aſſign or grant over the whole of his intereſt in a term, or he may grant it for a leſs number of years than he holds it, and ſuch leaſes are called derivative leaſes: and ſuch derivative leſſee, is compellable to pay rent, and perform covenants according to the terms agreed in ſuch grant, or aſſignment.

As to emblements, or the profits of lands ſowed, or planted by the tenant for years, the general rule is, that where the expiration of the term depends upon a certainty, the leſſee can take no benefit after the expiration of the leaſe, of any labour done before that time. If a man has a leaſe for a year, commencing and expiring on the firſt day of April, if he ſow winter grain within the year, he ſhall have no right to reap it after the end of his term. For it

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is the folly of the leſſee to ſow or plant when his term muſt certainly ceaſe before he can reap. So if the term ceaſe by any act of the leſſee, he is not entitled to the emblements. But if the continuance of the leaſe be dependent on any contingence, and this happens after the crop is ſown, and before it is ripe, the leſſee, or his repreſentatives ſhall have the emblements.

A queſtion has been agitated, whether the common law reſpecting emblements, where the termination of the leaſe depends upon a certainty, is obligatory in this ſtate. It has been contended that in leaſes for years, which have generally been for ſhort terms in this ſtate, that it is the common underſtanding of the parties, that the leſſee ſhall have liberty to ſow winter grain, and reap it the ſeaſon after the expiration of the leaſe, and that this is a reaſonable conſtruction in order to enable the leſſee to take the full annual benefit of a farm. In making a leaſe, it is eaſy for the parties to make proviſion in this reſpect, by which the leſſee may remove all doubts, and be ſecured in every right intended to be conveyed to him. But to admit ſuch a conſtruction reſpecting leaſes for years as has been inſiſted on, would be productive of the moſt dangerous conſequences. It ſubverts an ancient and long eſtabliſhed maxim of the common law, it deſtroys the expreſs agreement of the parties, and admits of a conſtruction of a leaſe, repugnant to the words of it. It render all contracts of this nature perfectly uncertain, becauſe by this conſtruction, it cannot be determined how much the leſſee for years, may ſow the laſt year of his leaſe, it may therefore be in his power to take the uſe of the land for the year after the expiration of the leaſe. To admit a conſtruction of law ſubverſive of the principles of contracts, is beyond the power of any court. As the common law reſpecting emblements, is founded in reaſon, and correſpondent to the fundamental rules of contracts, it muſt be deemed obligatory in this ſtate.

Tenant for years, is not not by the common law impeachable for waſte. He has therefore all the power to do waſte upon land, as a proprietor in fee, unleſs ſpecially reſtricted by ſome clauſe in the leaſe. It is uſual to reſtrict the tenant, to uſe and improve the premiſes according to the rules of good huſbandry. This may

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be conſidered merely as a prohibition to commit waſte, and leaves the tenant all the power given to tenants in dower.

Chapter Tenth.

OF ESTATES AT WILL, AND BY SUFFERANCE.

I. [g] ESTATES at will, are where the tenant has the uſe and improvement of the lands during the will of the leſſor. When the tenant has obtained the poſſeſſion of the lands, he acquires an uncertain and defeaſible eſtate, and is liable to be turned out of poſſeſſion whenever the proprietor pleaſes. The tenant has the ſame power to determine the eſtate, as the proprietor, the eſtate being dependent on the will of leſſor and leſſee. The tenant ſhall not be prejudiced by any ſudden determination of the eſtate by the leſſor. For if the tenant ſows, and the leſſor before the corn is ripe, or before it is reaped, determines the eſtate and puts him out, yet the leſſee ſhall have the emblements, and liberty to enter upon the land, to cut and carry them away. This is allowed on account of the uncertainty of the eſtate, for the tenant could not poſſibly foreknow when the landlord would determine the eſtate. As he could not guard againſt ſuch an event, he ſhall not be prejudiced by it, but ſhall have the profits of the crop. Upon the ſame principles, the tenant after the determination of the eſtate, by the will of the leſſor, ſhall have liberty of ingreſs and egreſs to fetch away his goods. But where the tenant by his own will determines the eſtate, he forfeits the emblements.

An eſtate at will may be determined by the expreſs declaration of the leſſor, of which he muſt give notice to the leſſee, or by entering upon and taking poſſeſſion of the land, or by giving a deed or leaſe for years, to commence immediately, or by the deſertion of the tenant, his making an aſſignment of the eſtate to another, or by his committing waſte. And laſt of all the death of either party, is a determination of the eſtate.

II. [h] Eſtates at ſufferance are, where the tenant gains poſſeſſion of lands, by a legal title, and then continues his poſſeſſion after his legal

[g] 2 Black. Com. 145. Co. Lit. 55. [h] 2 Black. Com. 150. Co. Lit. 57.

legal title has expired without any title. Thus where a man has a leaſe for years, or is tenant at will, and holds poſſeſſion of the lands after the determination of the eſtate, without any licence from the owner, or any contract made with him, he is called a tenant at ſufferance. By the common law of England, ſuch an eſtate may be deſtroyed by the entry of the owner, and without ſuch entry he cannot maintain treſpaſs againſt the tenant at ſufferance, as he might againſt a ſtranger; for his title having once been lawful, he ſhall never be called a treſpaſſer till the owner by ſome public act ſhall declare his poſſeſſion to be wrongful. But in this ſtate, who ever holds lands after the determination of his eſtate, is conſidered as a treſpaſſer, and as ſuch may be ſued and removed out of poſſeſſion without any previous entry by the owner.

Chapter Eleventh.

Of Estates upon Condition.

ESTATES upon condition, are more properly qualifications of other eſtates, than a diſtinct ſpecies, as they may be had in ſeveral kinds of eſtate already deſcribed.

i An eſtate upon condition may be defined to be where in the grant of the eſtate of whatever kind, there is expreſſed, or annexed ſome condition or qualification, by which the eſtate ſhall commence, be enlarged or defeated, upon the performance, or breach of ſuch condition or qualification. Theſe conditions may be either precedent or ſubſequent. Conditions precedent, are ſuch as muſt be fulfilled and complied with before the eſtate can veſt or be enlarged. For inſtance, if an eſtate be given to a perſon upon condition that he marry a certain woman, the condition is precedent and muſt be performed, before the eſtate can veſt. Conditions ſubſequent, are ſuch by the failure, or non-performance of which an eſtate already veſted may be defeated. Thus if one grant an eſtate to another upon condition, that he pay an hundred pounds in one year, the eſtate is dependent upon the ſubſequent condition of paying ſuch ſum of money, and on failure of performing the condition, the eſtate will be defeated. So if an eſtate be granted to

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i 2 Black Com. 152. Co. Lit. 201.

a widow during her widowhood, if ſhe marries, the eſtate is defeated.

But a material diſtinction is made between a *condition in deed*, and a *limitation*. When an eſtate by the words that create it, is ſo limited, that it cannot endure beyond the time when the contingency happens, on which it is to fail, this is called a limitation. Thus where lands are granted to a perſon ſo long as he holds a certain office, or while he remains unmarried, or until the rents amount to a ſpecific ſum, theſe are all limitations, and as ſoon as the contingencies happen, the ſeveral conditional eſtates ceaſe, and the ſubſequent eſtate which depended on ſuch determination, become immediately veſted without any act to be done by him who is next in expectancy.

But when an eſtate is, ſtrictly ſpeaking upon a condition in deed, as where it is granted upon condition to be void upon payment of a certain ſum of money, or on failure of paying a certain rent, or ſo, that the grantee continues unmarried, or provided he goes to York, the law permits it to endure beyond the time when ſuch contingency happen, unleſs the grantor, or his heirs, or his aſſigns take advantage of the breach of the condition, and make either an entry or claim in order to avoid the eſtate. Thus, if a leaſe be made on conditon to be void, if rent be in arrear for a certain time, and that the leſſor may re-enter: yet if the rent be in arrear, if the leſſor do not re-enter, and the leſſee afterwards pays up the rent, and the leſſor accepts it, the leaſe remains valid. Conditions can only be reſerved to the feoffor, donor, or leſſor, and their heirs, and not to a ſtranger. Therefore when the words creating an eſtate, ſtrictly import a condition, yet if on a breach of the condition, the eſtate be limited over to a third perſon, the law conſtrues it into a limitation, and not a condition: becauſe it is not in the power of the perſon, to whom it is limited, to avoid the conditional eſtate by entry, and it would be in the power of the perſons who have no intereſt in the eſtate, to preſerve or deſtroy it. So if a man deviſes eſtate to his heir at law, on condition that he pays a ſum of money, and on failure, deviſes it over to another; if the heir refuſes to pay the money, it ſhall be conſidered as a limitation, and the eſtate ſhall veſt in the other perſon to

whom

whom it was deviſed without entry, becauſe no perſon but the heir, can by law make the entry.

In all inſtances of limitations, or conditions ſubſequent, ſo long as the conditions remain unbroken, the grantee has an eſtate of freehold, or for years, according to the nature of the eſtate that was granted: for while the grantee preſerves the conditions on which he holds the eſtate inviolate, the law contemplates him as holding an abſolute eſtate.

Theſe conditions, if they be impoſſible at the time when they are made, or become ſo afterwards by the act of God, or by the act of the grantor himſelf, or if they are againſt law, or inconſiſtent with, or contradictory to the nature of the eſtate, they are void. If ſuch conditions are precedent, and neceſſary to be performed before the eſtate can veſt, the grant is void: but if the conditions be ſubſequent the eſtate inſtantly veſts in the grantee, as tho no condition had been annexed: For the eſtate having once veſted by the grant, it can never afterwards be defeated by a condition, either impoſſible, illegal or repugnant.

There are but few inſtances of conditional eſtates, excepting where lands are conveyed as pledges, to ſecure ſome debt or duty: theſe are living pledges, and dead pledges, or mortgages.

1. *k* A living pledge, is where a man borrows money of another, and grants him an eſtate to hold, till the rents and profits repay the ſum borrowed. The eſtate is conditioned to be void, as ſoon as the ſum borrowed ſhall be raiſed. The land or pledge is ſaid to be living, becauſe it ſubſiſts and ſurvives the debt, and on diſcharge of it, immediately reſults back to the borrower. This mode of pledging eſtates, is rarely uſed, while mortgages are very common.

2. *l* A dead pledge, or mortgage, is where a perſon to ſecure a debt which he owes, or money which he has borrowed, makes to his creditor an abſolute conveyance of lands, and annexes a condition, that on paying the ſum due, within a limited time, the deed ſhall be void, but on failure to be abſolute. The perſon executing ſuch conditional deed, is called mortgagor, and the perſon receiv-

k 2 Black. Com. 157 Co. Litt. 205. *l* 2 Black. Com. 158.

ing it, mortgagee. The mortgagee immediately becomes veſted with the legal title to the eſtate, defeaſible upon performing the condition, by the payment of the money due. He may go into poſſeſſion of the lands, unleſs reſtrained by ſome ſpecial agreement; but is liable to be diſpoſſeſſed upon the payment of the mortgaged money at the day limited, but the uſual practice is to ſuffer the mortgagor to continue in poſſeſſion till the time of payment be elapſed. If the money be not paid by the limited time the mortgagee becomes veſted with an eſtate abſolute and indefeaſible at law. But here equity interpoſes, and ſecures to the mortgagor a right to redeem the lands pledged upon payment of what is juſtly due. This ſubject however, more properly belongs to that branch of our enquiries, where we treat of the powers of courts of equity. It is ſufficient for us in this place to conſider mortgages as far as they are regulated by law.—In treating upon equity, we ſhall reſume this ſubject, and handle it with a minuteneſs correſpondent to its importance.

Chapter Twelfth.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

ESTATES are ſaid to be either in poſſeſſion, or expectancy.—The former are thoſe about which our enquiries have been principally concerned: for when we were contemplating eſtates, it was neceſſary to direct our attention to thoſe which in fact exiſted, and not to thoſe which are to exiſt in future. Nothing therefore can be particularly obſerved upon ſuch eſtates. This chapter will comprehend eſtates in expectancy, that will exiſt in future: which are of two kinds, the one called a remainder, and the other a reverſion. This brings us to that part of our diſquiſitions that relate to the time of the enjoyment of eſtates.

The laws reſpecting eſtates in expectancy, being very abſtruſe and intricate, and ſuch kind of eſtates not being very common in this ſtate, it will be unneceſſary to enter into a minute diſcuſſion of the

the ſubject: but as this branch of our juriſprudence, is neceſſary to be known, I ſhall extract a conciſe view of it, from the commentaries of judge Blackſtone.

I. "An eſtate in remainder is defined to be an eſtate limited, to commence and take effect after another particular eſtate is ended, and determined. Thus, a proprietor in fee conveys lands to one perſon for twenty years, and after that term expires, to another and his heirs forever, or to one perſon during life, and then to his heirs forever. Here the firſt perſons to whom theſe lands are given are tenants for years, or for life, and the remainder is to the other perſons, or their heirs in fee.

A perſon may limit a hundred remainders, or as many as he pleaſes upon the ſame eſtate, but they muſt be to perſons that are in life, or to the immediate heirs of ſuch as are in life, ſo as to avoid a perpetuity, which the law will not warrant. No remainder can be limited after the grant of an eſtate in fee-ſimple, for this comprehends the whole of the eſtate.

It is a general rule reſpecting theſe eſtates, that there muſt be ſome particular eſtate for life, or for years, precedent to the eſtate in remainder, in order to ſupport it, and that any thing which defeats the precedent eſtate, created to ſupport the remainder, will defeat the remainder.

Another general rule is, that the eſtate in remainder muſt paſs out of the grantor, at the ſame time that the particular precedent eſtate is created. Thus an eſtate granted to one for life, and then to another, and his heirs forever, the eſtate in the remainder, paſſes out of the grantor at the ſame time the eſtate for life is created, and veſts preſently in the remainder-man; tho to be poſſeſſed and improved in future, and the remainder-man, may transfer ſuch eſtate in remainder.

A third rule reſpecting eſtates in remainder is, that they muſt veſt in the remainder-man during the particular precedent eſtate, or at the inſtant it determines. Thus, if an eſtate be granted to one perſon for life, and then to the eldeſt ſon of another in fee,

" 2 Black. Com. 164. Co. Lit. 143.

if the tenant for life die, before the other perſon has a ſon born, the remainder is gone, and tho he afterwards have a ſon, he cannot take by the grant, for the particular eſtate, that ſupported the remainder, having ceaſed before his birth, the remainder falls to the ground, and the eſtate reverts to the grantor, or his heirs.

On theſe rules, it is ſaid, that the doctrine of contingent remainders depends. Remainders are either veſted, or contingent. Veſted remainders, or remainders executed, are where a precedent intereſt immediately veſts, tho to be enjoyed in future, being fixed with certainty, to a determinate perſon, after the particular eſtate is ended. Thus if one perſon be tenant for life, remainder to another in fee, the laſt man has a veſted remainder. Contingent, or executory remainders paſs no preſent intereſt, and are where the eſtate in remainder is limited to commence, and veſt either in a dubious or uncertain perſon or upon a dubious, and uncertain event, whereby the precedent eſtate may happen to be determined, and the remainder be wholly defeated, and never take effect. Thus where a perſon is tenant for life, with remainder to the eldeſt ſon of another perſon, then unborn, this remainder is contingent, for it is uncertain whether ſuch perſon will ever be born; but whenever ſuch ſon is born, the remainder inſtantly veſts, and is no longer a contingent, but a veſted remainder: tho if ſuch ſon ſhould not be born, till after the particular eſtate is determined, the remainder would be defeated. Theſe remainders muſt be limited to ſome perſons that may by poſſibility be in exiſtence before the particular eſtate ends; for where the poſſibility is very remote, depending upon two, or more contingencies, the remainder is void.

A remainder is alſo ſaid to be contingent, where the perſon is fixed, but the event on which he is to take, is uncertain. Thus where an eſtate is granted to one for life, and another in fee, in caſe he ſurvives, the remainder depends on the ſurviverſhip, and that failing, the remainder is gone.

Contingent remainders of either kind, if they amount to a freehold eſtate, cannot be limited upon any particular eſtate leſs than a freehold, for unleſs the freehold paſſes out of the grantor, when the remainder is created, ſuch freehold remainder is void. The

remainder

remainder cannot paſs without veſting ſomewhere, it muſt veſt in the particular tenant, or it can veſt no where, unleſs ſuch tenant have an eſtate of a freehold nature, it cannot veſt in him, and if it does not, a freehold cannot be created.

But a ſpecies of eſtates, ſimilar to theſe, may be created by will without attending to theſe rules, by reaſon of the more liberal conſtruction that is given to wills. Such eſtates, ſo created by will, are denominated executory deviſes. An executory deviſe is defined to be a diſpoſition of lands by will, where no eſtate veſts at the death of the teſtator, but is to commence on ſome future contingency. There is no neceſſity of any particular precedent eſtate to ſupport an executory deviſe. As where a man deviſes lands to a ſingle woman, and her heirs, to take on the day of her marriage, if the woman be unmarried at the time of the deceaſe of the teſtator, the eſtate deſcends to his lawful heirs in fee, and ſo continues till the woman be married, and then it veſts in her. This limitation of the eſtate, would be void in a deed, but is good in a will, becauſe, by a deviſe a freehold eſtate can paſs without delivery of poſſeſſion, and may commence in future.

An executory deviſe of an eſtate in fee-ſimple, or other leſs eſtate may be limited after an eſtate in fee. A man may deviſe his whole eſtate in fee, and then limit a remainder, to take effect on a future contingency. Thus if a man deviſes his eſtate to one and his heirs, and if he dies before a certain age, then to another and his heirs, this remainder is good, by way of executory deviſe, but would be void in a deed. But the contingencies, muſt be ſuch as will happen in a reaſonable time, and not amount to a perpetuity.

By an executory deviſe, a term for years may be given to one man during life, and a remainder, be limited over to another, which cannot be done by deed, for a life eſtate being deemed larger than any eſtate for years, a deed of a life eſtate is ſuppoſed to comprehend the whole term, but in conſequence of the liberal conſtruction that is given to wills, a man may in caſes of long terms, deviſe an eſtate for life and limit a remainder. The Deviſor in ſuch caſes may limit as many remainders as he pleaſes, but the perſons muſt all be in eſſe during the life of the firſt deviſee, for then the candles are all lighted, and are conſuming together,

and

and the ultimate remainder is in reality only to that remainder-man, who happens to ſurvive the reſt, or ſuch remainder muſt be limited to take effect upon ſuch contingency only, as muſt happen, if at all during the life of the firſt deviſee.

II. Eſtates in reverſion, reſult from the operation of law, and are defined to be the reſidue of the eſtate left in the grantor, to commence in poſſeſſion, after the determination of ſome particular eſtate granted out by him. Thus when a man grants an eſtate for life, for years, or at will, the reverſion continues in the grantor, and inſtantly takes effect upon the expiration of ſuch eſtates ſo granted. For it is an eſtabliſhed doctrine of law, that the fee-ſimple of all lands muſt abide ſomewhere, and if he who has the whole carves out a ſmaller eſtate, whatever is not granted, remains in him. Eſtates in fee-tail, on failure of perſons to whom they are limited, revert to the donor. Eſtates in reverſion, as well as remainder, are transferable.

It is a general rule of law, that whenever a greater and leſs eſtate meet, and unite in the ſame perſon, without any intermediate eſtate, the leſs is immediately annihilated, and merged or ſunk in the greater. Thus, if there be tenant for years, and the reverſion in fee-ſimple deſcends to, or is purchaſed by him, the term of years is merged in the inheritance, and ſhall exiſt no more. But where the perſon holds the eſtates by different rights, they ſhall continue diſtinct and ſhall not merge. Thus if a perſon has a free-hold in his own right, and a term for years, in another's right, no merger of theſe eſtates can take place. But eſtates in tail, are an exception to this rule; for if a perſon, who may be called the firſt donee in tail, ſhould purchaſe the reverſion in fee, of the donor, yet the eſtate tail ſhall not merge; becauſe by the ſtatute it was intended, that the firſt donee ſhould do no act, by which it ſhould be in his power to defeat the eſtate-tail.

Chapter Thirteenth.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

THIS chapter conſiders the number and connexion of the owners of eſtates.

I. Eſtates in ſeveralty, are where one perſon is the ſole owner, without any connexion with any other perſon. This is the moſt common kind of eſtates, and it is this we mean, when we ſpeak of eſtates in general. When we intend any other kind, it is particularly mentioned by way of diſtinction. Nothing further need be obſerved on this head. We proceed to a conſideration of the other ſpecies of eſtates.

II. [n] An eſtate in joint-tenancy, is where lands are granted to two or more perſons to hold in fee-ſimple, fee-tail, for life, for years, or at will. The creation of this eſtate depends upon the expreſſions in the deed, or deviſe, by which the tenants hold, for it reſults from the acts of the parties, and not from the operation of law. Thus an eſtate given to a number of perſons, without any reſtrictive, excluſive, or explanatory words, will be conſtrued a joint-tenancy; for every part of the grant can take effect only by conſidering the eſtate equal in all, and the union of their names, gives them a union in every reſpect.

The *proprieties* of this eſtate ariſe from its unity, for it is eſſential that joint-tenants have unity of intereſt, of title, of time, and of poſſeſſion. The unity of intereſt extends to the ſame period of time, for its duration, and the ſame quantity of intereſt, and a difference in either is inconſiſtent with a joint eſtate. The unity of title, conſiſts in the eſtate being created by and derived from one and the ſame conveyance. The unity of time conſiſts in the eſtates being created and veſted in all at the ſame period; and the unity of poſſeſſion, makes it neceſſary that all ſhould poſſeſs at the ſame time; for they have not a divided poſſeſſion, one having the poſſeſſion of one part, and another of a different part, but each has the entire poſſeſſion of every parcel as well as of the whole, and they are ſaid to be ſeized [o] by the half or moiety, and by the whole.

The

[n] 2. Black Com 179. Co. Lit. 189. [o] Par mie et per tout.

The *incidents* to joint eſtates are, that the act of each tenant, in many caſes is conſidered as the act of the whole. A verbal leaſe, by one, reſerving rent to himſelf, ſhall enure to the benefit of all. The ſurrender of a leaſe to one, that was given by all, ſhall enure to the benefit of all. Delivery of poſſeſſion to one, or an entry or re-entry by one, has the ſame operation, the poſſeſſion of one, is the poſſeſſion of all, ſo as to prevent either from gaining a title by the poſſeſſion of fifteen years. So if either of the joint-tenants come within the deſcriptions of the ſaving clauſe of the ſtatute, reſpecting the poſſeſſion of lands, he ſaves the eſtate for all. They cannot ſue or be ſued without joining or being joined in the ſuit, in all actions that relate to the joint eſtate. One joint-tenant, cannot maintain an action of treſpaſs againſt another, in reſpect of the land, for each has an equal right to enter upon any part of it. But one joint-tenant, has not the power by himſelf, to do any act which may defeat the eſtate of the other, as to leaſe the land, ſo as to prevent the other from poſſeſſing and improving. If one joint-tenant commit waſte which tends to the deſtruction of the inheritance, no action lies at common law. No action of account lies at common law in favour of one joint-tenant, againſt another, unleſs he had conſtituted him his bailiff and receiver. *p* But now by ſtatute, an action of account lies in favour of one joint-tenant, his executors or adminiſtrators, againſt another, and his executors and adminiſtrators, as bailiffs and receivers, to render their reaſonable account, for the uſe and profits of the joint eſtate, that have been taken, more than their proportion.

In England on the death of either of the joint-tenants, his right remains, and goes to the ſurviving tenants. But in this ſtate we have never adopted this odious and unjuſt doctrine of ſurvivorſhip, but on the deceaſe of one of the joint-tenants, his ſhare deſcends to his heirs.

Theſe eſtates may be ſevered, or deſtroyed by the act of the parties in making a voluntary partition of the land. By the common law one joint-tenant cannot compel his fellows to make partition, *q* but by ſtatute partition can be enforced by an action, or writ of partition where the partners cannot agree among themſelves

p Coates, 12. *q* Ibid. 116.

ſelves. The death or alienation of one of the tenants ſever the joint-eſtate, and reduce it to a tenancy in common.

III. [r] An eſtate in coparcenary is where lands of inheritance deſcend from the anceſtor, to two, or more females his daughters, ſiſters, aunts, couſins, or their repreſentatives in equal ſhares, there being no male heirs: in ſuch caſes they are called co-parceners, or for brevity's ſake parceners. This ſpecies of eſtate ſeems to have been introduced into England on this account. The general law there is, that if there be ſons, the eldeſt ſhall inherit the whole lands: but if there be daughters they ſhall inherit equally, and to diſtinguiſh this ſpecies of eſtates they have called female heirs, parceners. But in this ſtate we have not in reality any occaſion to make this diſtinction, for by our laws all male, and female heirs in the ſame degree inherit alike, and if there be male and female or female heirs only, the ſtatute law has provided for the diſtribution of the eſtate by the order of the court of probate. In all caſes where lands deſcend to a number of heirs, ſuch heirs may be conſidered as joint tenants, or tenants in common till the diſtribution, of the eſtate takes place, and in caſe of a number of female heirs, if they do not proceed to a diſtribution, purſuant to the ſtatute, they may be called parceners, but have the ſame eſſential relation to each other as joint-tenants; there being only a nominal diſtinction, as they inherit the eſtate, and it may veſt in them at different periods, but cannot be done in joint-eſtates.

Parceners have the ſame unity of intereſt, title, and poſſeſſion as joint-tenants. They muſt ſue and be ſued jointly in all matters reſpecting their own lands; and the entry and poſſeſſion of one, enures to the benefit of all, in the ſame manner as in the caſe of joint-tenants. They cannot maintain actions of treſpaſs or waſte againſt each other. In England the doctrine of ſurvivorſhip is not admitted, becauſe they are not conſidered as poſſeſſed of an entirety, but a diſtinct moiety of the eſtate. At the common law, account will not lie in favor of one parcener againſt another, but by our ſtatute law this action lies in favor of one parcener, her executors and adminiſtrators againſt another parcener, and her executors and adminiſtrators, as bailiffs, and receivers for

[r] Black. Com. 187. Co. Lit. 163.

the rents, and profits of the land, where they have received more than their juſt proportion.

By the common law, and alſo by the ſtatute law, parceners may compel a partition of their eſtates by action of partition. They may diſſolve the eſtate by voluntary partition, alienation, or by veſting the whole in one perſon, which reduces it to an eſtate in ſeveralty.

IV. [f] Eſtates in common are where ſeveral perſons hold by ſeveral and diſtinct titles, but by unity of poſſeſſion, for the ſeperate eſtate of each, not being aſcertained they muſt all improve together. Unity of poſſeſſion is eſſential to conſtitute this eſtate. But the quantity of intereſt, the manner in which the title is derived, and the time of enjoyment may be totally different, one may have a freehold intereſt, another an eſtate for years, one may derive his title by deſcent, and another by purchaſe, and if there be a unity of poſſeſſion, it conſtitutes an eſtate in common.

Where an eſtate by our law deſcends to a number of heirs in equal ſhares, (as is the caſe in all deſcents of lands, the owner dying inteſtate leaving a number of children,) the heirs have an eſtate attended with all the properties of a joint-tenancy; for there is unity of time, intereſt, title, and poſſeſſion, but as they derive their title by deſcent, which is repugnant to the nature of a joint eſtate, they muſt be conſidered as tenants in common, and by our law an eſtate in common, in ſuch caſes, may contain all the unities of a joint eſtate.

Eſtates in common may be created by a diſſolution of eſtates in joint-tenancy and coparcenary, where the unity of poſſeſſion is left. Thus if there be two joint-tenants or parceners, and one aliens his right, the other joint-tenant, or parcener and the alienee are tenants in common. This deſtroys that unity which conſtitutes the former eſtates, and of courſe they are changed into eſtates in common. Eſtates in common may be expreſsly created by deed. Thus where an eſtate is given to two, to be holden one moiety by one, and the other moiety by the other, it is a tenancy in common, becauſe joint-tenants do not have diſtinct moieties. A deviſe to

two

[f] 2 Black. Com. 191. Co. Lit. 188.

two perſons to hold jointly and ſeverally, is a joint eſtate. An eſtate granted to two perſons, to be equally to be holden between them, in deeds, is ſaid to be a joint eſtate, and in wills a common eſtate; but the ſafeſt method is to declare by expreſs words in the deeds or wills, the kind of eſtate intended to be created.

By the law of England, the right of ſurvivorſhip, does not take place in eſtates in common. By the common law, tenants in common muſt join in all perſonal actions, where the profits of the land or ſome entire indiviſible things are in queſtion, as in actions of treſpaſs againſt ſtrangers: but in all real actions where the realty, or title of the land is concerned, they muſt bring ſeveral actions, as in caſes of diſſeiſin—becauſe the poſſeſſion only is joint, and not the title. If an action be brought by a tenant in common, when all ought to join, the defendant can take advantage only by a plea in abatement. Actions of waſte and account do not at common law lie in favour of one tenant in common, againſt another, but account lies by the ſtatute law. If one tenant in common diſſeiſe, or eject another, the tenant ſo diſſeiſed, may have an action of diſſeiſin againſt the ejector. But then it muſt be an actual diſſeiſin, as turning him out, and hindering him from entering, and a bare perception of the profits will not be enough.

Eſtates in common may be diſſolved by uniting all the titles and intereſts in one tenant, by purchaſe, or otherwiſe, or by voluntary partition. The ſtatute law authoriſes a compulſory partition by action or writ of partition.

Chapter Fourteenth.

OF TITLE TO THINGS REAL IN GENERAL.

IN the preceding part of this book, we have conſidered the nature of things real, the manner of holding them, and the different kinds of eſtates that may be had in them. We come now to conſider the title to things real, with the manner of acquring and loſing it.

The nature of our general title to things was explained in the firſt chapter of this book. We are now to contemplate the title of individuals to lands in virtue of poſitive laws. A title may be defined to be a juſt right, which a certain man has according to the rules of poſitive law, to enter upon, poſſeſs, occupy, and take the benefit of a particular tract of land, in preference to, and in excluſion of the reſt of mankind. There are however ſeveral degrees in which ſundry perſons may have a kind of right to lands, which muſt be conſidered to form an idea of a compleat title to lands.

t The naked poſſeſſion, or actual occupation of lands without any color of right, is the loweſt degree of title. Such is the caſe with all diſſeiſors, who by force, or ſurpriſe turn the owners out of the poſſeſſion of their lands, and obtain the poſſeſſion; or who by any method whatever, obtain the actual occupation of lands, which are owned by other perſons. In all theſe inſtances, the diſſeiſor has nothing but the naked poſſeſſion, is a treſpaſſer, and may be removed by the proprietor, at any time within fifteen years: but if he neglect to make his entry, keep up his claim, or bring his action within fifteen years, the diſſeiſor acquires an abſolute indefeaſible title. Such diſſeiſor may hold poſſeſſion of the lands againſt all perſons, but the lawful proprietor.

2. *u* While the diſſeiſor has the actual poſſeſſion of the lands, the diſſeiſor has the *right of poſſeſſion*, and *the right of property*, between which there is no diſtinction by our law. The lawful proprietor may at any time within fifteen years, maintain an action of treſpaſs againſt the diſſeiſor, may enter upon, and take poſſeſſion of the lands, or may remove him by an action of diſſeiſin, and thus extinguiſh his poſſeſſory title. When the perſon who has the right of poſſeſſion and property, obtains the actual poſſeſſion of the lands, he eſtabliſhes a compleat title.

3. *w* For by our law to conſtitute a perfect title to lands, it is eſſential, that there be a conjunction of the right of poſſeſſion and property, with the actual poſſeſſion. When this union is compleated, the title is firm, permanent and eſtabliſhed, and the proprietor

t 2 Black. Com. 195. *u* Ibid. 196. *w* Ibid. 199.

prietor may diſpoſe of it as he pleaſes, and may hold, poſſeſs and improve, to the excluſion of all the reſt of the world.

Chapter Fifteenth.

OF TITLE BY DESCENT.

WE have conſidered the different kinds of eſtates in things real and the requiſites to conſtitute a general title. We now proceed to a contemplation of the particular titles to lands.

There are but two methods by which a title to real eſtates can be acquired. *Deſcent*, where the title reſults from the operation of law, and *purchaſe* where the title is acquired by the act and agreement of the parties. This chapter will be devoted to a particular inveſtigation and illuſtration of the law, reſpecting the acquiſition of property by deſcent.

* Deſcent, or hereditary ſucceſſion, is the title by which a man on the death of his anceſtor or other relations acquire his eſtate by right of repreſentation, as his heir at law. An heir therefore is the perſon on whom the eſtate devolves by force of law, on the death of the anceſtor : and all ſuch eſtates thus deſcending to the heir are called inheritances. To elucidate the doctrine of deſcent it is neceſſary to exhibit a conciſe view of the nature of kindred and the ſeveral degrees of conſanguinity, or alliance by blood.

Conſanguinity is defined to be the relation ſubſiſting between all the different perſons, that deſcend from the ſame ſtock or common anceſtor. Some portion of the blood of the common anceſtor flows into the veins of all his deſcedants, and tho mixed with the blood flowing from a thouſand other families, yet it conſtitutes the kindred or alliance by blood, between each individual, this relation by blood has two diviſions. Lineal conſanguinity, and collateral, or tranſverſal conſanguinity. We ſhall firſt explain lineal conſanguinity. This is that relation which exiſts between perſons where one is deſcended from the other, as between the ſon, the father, the grandfather, the great-grandfather, and ſo upwards in a direct aſcending line, or between the father, the ſon, the grandſon, the great-grandſon, and ſo downwards in a direct deſcending line. Every

* 2 Black. 200. Co. Lit.

Every generation in this direct courſe, makes a degree of conſanguinity, computing either in the aſcending or deſcending line.—This being the natural method of computing the degrees of lineal conſanguinity, it has been adopted by the canon, the imperial, and the common law.

y It is remarked by judge Blackſtone in his commentaries on the laws of England, to be aſtoniſhing to conſider the number of lineal anceſtors, which a man has in a few degrees, and that he is ſaid to contain as many bloods in his veins, as he has lineal anceſtors; that he has two in the firſt degree, his own parents, four in the ſecond, his grand parents, eight in the third, his great-grandparents, and ſo on, doubling the number at every degree, which by the rule of geometrical progreſſion, demonſtrates, that there are a thouſand and twenty-four lineal anceſtors, in the tenth degree, and more than a million in the twentieth. To purſue this calculation upon the ſame principles, through as many generations as have paſſed away ſince the creation of the *firſt pair*, would extend the number of our lineal anceſtors infinitely beyond all human conception. But we have the authority of revelation to aſſure us, that in the origin of the world, one pair only was created, and that from them has ſprung the whole race of mankind. We muſt therefore, in making our calculations upon theſe principles, take into conſideration the circumſtance, that in ſome ſtage of our calculation, we muſt begin to leſſen our number of lineal anceſtors, for the purpoſe of uniting in our deſcent from the original parent of the human race. The ſlighteſt obſervation will ſhew, that there is a conſtant intermarriage between relations in degrees not very remote, by which the number of lineal anceſtors are diminiſhed, in a manner not capable of calculation. So that a whole country in tracing their progreſs through a few ages, will find, they all deſcended originally from a few families. America furniſhes a moſt illuſtrious example, to demonſtrate this fact. From a few thouſand perſons, who firſt emigrated into this country, a wide extended continent has been peopled in leſs than two centuries.—Much the greateſt part of the inhabitants now living in the United States, muſt trace their lineal anceſtry through the firſt emigrants.

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y 2 Black. Com. 203.

The rule of geometrical progreſſion, would be mathematically true, if there were no intermarriages between relations in any, even the remoteſt degrees; but when we conſider the conſtant intermarriage of relations, which neceſſarily took place for the original propagation of the human race, and which muſt now take place for their preſervation, it is evident that this rule in no meaſure, aſcertains the actual number of our lineal anceſtors, even in degrees not very remote, and that it is wide of the truth, to ſay, that a man has as many different bloods in his veins, as he has lineal anceſtors, by the rule of geometrical progreſſion, as adopted by Blackſtone.

Collateral, or tranſverſal conſanguinity, is a relation ſubſiſting between perſons that deſcend from the ſame common anceſtor, but not from each other. It is eſſential to conſtitute this relation, that they all ſpring from the ſame common root or ſtock, but in different branches. Thus if John Stiles have two ſons, and they both have iſſue the children of both are lineally deſcended from John Stiles, as their common anceſtor, but they are related to each other by collateral conſanguinity, becauſe they have not deſcended lineally from each other, but collaterally from the ſame common anceſtor.

From this repreſentation of tranſverſal kindred, it is very eaſy to conceive, that from each anceſtor which a perſon has, there is iſſuing a race of collateral kinſmen, and that the number of them in the various degrees in which they ſtand related, muſt be beyond all conception.

Hereditary ſucceſſion among collateral relations, is the moſt difficult to be aſcertained. It is therefore neceſſary to illuſtrate the mode by which the degrees in this kind of conſanguinity are computed. The method adopted by the canon law and the common law of England is this. Having diſcovered the common anceſtor, to begin with him, and reckon downwards, and the degree the two perſons, or moſt remote of them is diſtant from the anceſtor, is the degree of kindred ſubſiſting between them. For inſtance, two brothers are related to each other in the firſt degree, becauſe from the father to each of them, there is but one degree. An uncle and nephew,

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are related to each other in the ſecond degree, becauſe the nephew is two degrees diſtant from the common anceſtor, and the ſame rule of computation is extended to the remoteſt degrees of collateral relations.

The method adopted by the civil, or imperial law, is this, to begin at either of the perſons in queſtion, and count up to the common anceſtor, and then downwards to the other perſon, calling it a degree from each perſon, both aſcending and deſcending, and the number of degrees they are diſtant from each other, is the degree in which they ſtand related. Thus from a nephew to his father, is one degree, to the grand-father, two degrees, and then to the uncle three, which points out their relationſhip. Thus if John Stiles's two ſons have each a ſon, they are related to each other in the fourth degree: for we muſt compute from one of the grandſons to the father, then to the grand father, then deſcend to the father of the other, and then to him, which makes four degrees: but according to the other method, they are related in the ſecond degree.

It is however immaterial which mode of computation is adopted, for both will eſtabliſh the ſame perſon to be the heir. As the imperial mode points out the actual diſtance between the perſons in queſtion, and as our eſtates deſcend nearly according to the Roman law, there ſeems to be a propriety in making our computations according to that mode. Nor is it probable, that the mode according to the canon law had ever been introduced, had it not been calculated to anſwer an important purpoſe for the canoniſts. The prohibition of marriage originally extended to the third degree of conſanguinity, according to the imperial mode of computation. The profits of granting diſpenſations to perſons to marry within the prohibited degrees, was an object to the papal power, and the introduction of the mode of computation by the canon law, which extends the prohibition to the ſixth degree, comprehended many more ſubjects for diſpenſation, than the mode before adopted, and poured a rich ſtream of wealth into the treaſury of God's vicegerent.

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Having thus concifely explained the nature of conſanguinity and the mode of aſcertaining the degrees of kindred, I proceed to lay down the rules by which the ſucceſſion to eſtates is determined.

The rules of deſcent are eſtabliſhed by the ſtatute concerning teſtate and inteſtate eſtates. An explanation and illuſtration of the principles contained in this ſtatute, and the conſequences reſulting from them, is all that is neceſſary to compleat this branch of our enquiries.

I. The firſt general rule is, that eſtates of inheritance where the proprietor dies inteſtate, leaving children, ſhall deſcend to them all, in equal ſhares, whether ſons or daughters.

A poſthumous child, or one born after the death of the inteſtate, will take with the other children; for the eſtate will veſt in the child in the mother's womb, or as the law calls it, in ventre ſa mere.

This comprehends all eſtates to which the inteſtate had the right of poſſeſſion, as well as the right, and actual poſſeſſion: but an exception is made to the general rule, where any of the children have had any eſtate by way of ſettlement, from the inteſtate in his life time, equal to the ſhares of the other children: but if the eſtate advanced by ſettlement be not equal to the ſhares of the reſt, then ſuch proportion ſhall be allowed them, as will make all their ſhares equal. The widow of the inteſtate, if he leaves any, is entitled by way of dower, unleſs endowed before marriage, to the uſe, and improvement of one third part of the real eſtate during her life; and at her deceaſe, the ſame is to be divided in the ſame manner as the reſt of the eſtate, if it be undivided at that time.

As the ſtatute reſpecting deſcents comprehends real, as well as perſonal eſtate, there is a proviſion that in the diſtribution of the eſtate, that the male heirs ſhall have their parts in real eſtate as far as the eſtate will allow. So where a diviſion of an eſtate in houſes and lands will be of great prejudice and inconvenience, the court of probate may direct that the eldeſt, or on his refuſal either of the reſt, if they conſent, may take the whole at the appraiſal of indifferent men, under oath, and pay, or ſecure to each, their proportion in a reaſonable time.

This rule is very different from the Engliſh law, where the eldeſt ſon only inherits, and the daughters never, unleſs there be a failure of males. This feudal idea reſpecting deſcents, was diſregarded by our anceſtors, when they formed their code of laws: but their reverence for the bible, and probably ſome prejudice remaining in favor of the principle of keeping up families, by aggrandizing the eldeſt ſon, induced them to copy from the law of Moſes, that regulation which confers on the eldeſt ſon a double portion. But this principle appears manifeſtly unwarrantable, when it is conſidered that all the children of the inteſtate have by nature equal claims upon his eſtate, without diſtinction of age or ſex, and that there is no particular neceſſity exiſting, which requires that the eldeſt ſon ſhould have a larger portion of the eſtate of the father, than the youngeſt. In the year 1792, this part of the law was repealed, and all the children placed upon the ſame footing.

II. The ſecond general rule is, that where any, or all of the children are dead, the eſtate ſhall deſcend to their legal repreſentatives. If one ſon be dead, leaving two or more children, they ſhall ſtand in the place of their father, and by the right of repreſentation, inherit that portion of the eſtate to which he would have been entitled had he been living. If all the children be dead, each leaving a number of children, the children of each, being the grand-children of the inteſtate, ſhall repreſent their reſpective parents, and inherit their portions. The eſtate therefore muſt be divided into as many equal ſhares, as the inteſtate left children, and the iſſue of each child will take that portion, which would have belonged to him, had he been living, to be divided equally among them. If each child ſhould leave a different number of children, yet the branches of each ſtock, the children of each child, take what would have been the ſhare of the parent, and the eſtate is not to be equally divided among all the grand-children, without any reference to their parents. In the laſt caſe, ſuppoſe one of the grand-children dies before the inteſtate, leaving iſſue, ſuch iſſue will ſtand in the place of the parent, and be entitled to his ſhare.

This inheriting by the right of repreſentation, is alſo called a ſucceſſion *per ſtirpes*, according to the roots, becauſe all the branches

ches inherit the ſame ſhare, that their root whom they repreſent would have done. Thus in the laſt mentioned caſe, all the grand-children of each particular child, being the branches, are entitled to receive the ſame portion of the eſtate, which their parents, being the roots, would have done had they been living. If the eſtate ſhould be divided equally among all the grand-children, without any reference to the ſtock, from whence they ſprung, it would be a ſucceſſion *per capita*, according to the heads. It is a general rule that the lineal deſcendants of any perſon deceaſed, ſhall repreſent their anceſtor in infinitum, and ſtand in the ſame place as he would have done had he been living. The right of repreſentation continues without limitation in the deſcending line, and the inheritance deſcends *in ſtirpes* according to the roots. If one of three ſons die, leaving ſix children, and then the father die, the two ſurviving children will take each one third part of the eſtate, and the other third part will remain to the ſix grand-children.

III. The third general rule is, that on failure of children, or lineal deſcendants of the inteſtate, the inheritance, if derived by deſcent, gift, or deviſe, from the parent anceſtor, or other kindred of the inteſtate, ſhall deſcend in equal ſhares to his brothers and ſiſters, and thoſe who legally repreſent them, of the blood of the perſon or anceſtor from whom ſuch eſtate came or deſcended.

We now are to conſider the deſcent of lands among collateral relations. The law has pointed out two modes, of collateral deſcent, according to the different modes, by which lands can be acquired. We are firſt to conſider the deſcent of lands, that were derived to the inteſtate from ſome of his kindred, by deſcent, gift or deviſe. In all theſe inſtances the perſon receiving the eſtate pays no conſideration, it is in the nature of a gift, and therefore on failure of his lineal heirs, it appears to be conſonant to the principles of equity, that the lands ſhould go to thoſe perſons who are of the blood of the relation, from whom they came. It is a fundamental doctrine of the common law of England, that in collateral deſcents the lands ſhall go to the relations of the blood of the firſt purchaſer, who is the perſon from whom the lands are ſuppoſed

z Statutes 51.

originally to have deſcended. On this principle our law has made a diſtinction in the mode of the deſcent of lands, that came to a perſon by deſcent, gift, or deviſe, from ſome kindred; and that are acquired by actual purchaſe, or by deviſe, or gift from ſome ſtranger; and has adopted the doctrine that lands acquired in the manner now under conſideration, ſhall go to the neareſt relations, of the blood of the kindred from whom they were derived. In the application of this general rule, we ſhall find that in all inſtances the brothers and ſiſters of the whole blood of the inteſtate, ſhall inherit his eſtate, that in ſome inſtances brothers and ſiſters of the whole and half blood, will inherit together; that in ſome inſtances brothers and ſiſters of the half blood, will inherit, and in ſome be excluded, and the eſtate go to a remote relation in preference to them. Brothers of the whole blood, are where they deſcend from the ſame couple of parents; of the half blood, where they have the ſame father, and two mothers, or the ſame mother and two fathers. So a kinſman of the whole blood, muſt be derived not only from the ſame anceſtor, but the ſame couple of anceſtors; but a kinſman of the half blood in the degrees, beyond brothers, is where one of the anceſtors in ſome ſtage was the ſame, and the other was not.

All brethren of the whole blood of the inteſtate, will neceſſarily be of the whole blood of the relation, from whom the lands came. But ſuppoſe John Stiles has four ſons, two by a firſt, and two by a ſecond marriage, and dies, leaving an eſtate which deſcended in equal ſhares to them. If either of the four ſons die without iſſue, the eſtate which deſcended from his father, would be equally divided among the ſurviving brothers of the half as well as the whole blood, becauſe they are all of the blood of the father, from whom the land was derived. But if two of the brothers, by one marriage, ſhould inherit an eſtate from their mother, and one of them die without iſſue, then the other brother of the whole blood, only would inherit, becauſe the half blood would not be related to the perſon, from whom the land came. If the two brothers by one marriage ſhould die without iſſue, leaving maternal eſtate, the half brothers could not inherit; but the eſtate muſt go to the

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neareſt maternal relations. If lands ſhould deſcend, be given or deviſed to either of the four brothers from a paternal uncle, or any paternal relation, and either die without iſſue, the land deſcends equal to his brothers of the whole and half blood: if lands ſhould be thus derived from a maternal uncle, or any maternal relation and either die without iſſue, his ſhare muſt go to the uterine brother, or brother of the whole blood, and never to the brother by the father's ſide. In caſe of the death of any brother or ſiſter leaving iſſue, their children ſhall by the right of repreſentation ſtand in their ſtead, and be entitled to their ſhares. But the right of repreſentation, among collateral heirs, extend no further than the children of brothers and ſiſters.

IV. The fourth general rule is, that on failure of brothers, or ſiſters, and their legal repreſentatives, the eſtate derived to the inteſtate by deſcent, gift, or deviſe from ſome relation, ſhall deſcend to the neareſt of kin to the inteſtate, and of the blood of the anceſtor or perſon from whom it was derived.

The reaſon of this diſtinction, reſpecting deſcents in our law, ſeems to be this, that where eſtates have been derived from ſome kindred, the heirs of the perſon from whom they came, have the beſt title to the reverſion, in caſe of the failure of lineal deſcendants or brethren of the inteſtate, and therefore the eſtate ſhall deſcend to them, and not to the general heirs of the inteſtate, which might carry the eſtate wholly out of the families from whence it came.

In explanation of this rule, it is only neceſſary to obſerve, that we muſt aſcertain the relation from whom the eſtate came, whether it be father, uncle, couſin, paternal or maternal relation, and then the neareſt of kin to the inteſtate of the blood of ſuch relation, by the mode of computing the degrees heretofore pointed out, is the heir. If no perſon of the blood of the relation from whom the eſtate came, can be found, it will not go to any other kindred of the inteſtate, but will eſcheat for want of legal heirs. When the ſtock from whence the degrees of conſanguinity are to be computed, is aſcertained, the ſame method is adopted, as in the rules hereafter mentioned, in which this ſubject will be fully conſidered. The

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donor can never inherit the eſtate given by him, if living at the death of the donee, but his parents may in the ſame manner, as in the caſes hereafter mentioned, for the expreſſion of the blood of ſuch perſon, excludes the perſon himſelf.

V. The fifth rule is, that on failure of lineal deſcendants, the eſtate acquired by actual purchaſe, or by the gift or deviſe of ſome perſon, not of kin to the inteſtate, ſhall deſcend in equal ſhares to his brothers and ſiſters of the whole blood, and thoſe who legally repreſent them. But no repreſentatives are admitted among collaterals, after brothers and ſiſters children If the inteſtate, left three brothers they would all inherit equally, if one of the brothers ſhould die before the inteſtate, leaving children, they would repreſent their father, and take his ſhare. If all the brothers had died before the inteſtate, each leaving a different number of children, the ſucceſſion would be per ſtirpes, or by the roots, which was adjudged in the following caſe. [a] A perſon deviſed a certain portion of his eſtate, to be divided among his relations, according to the laws of the ſtate of Connecticut, he had five brothers and ſiſters, who all died previouſly to the making of the will, each leaving a different number of children. The children of that brother who left the greateſt number, claimed a diviſion of the eſtate per capita, or according to the numbers, that is, ſhare and ſhare alike: that inſtead of dividing the eſtate into five equal parts, which was the number of the brothers and ſiſters of the teſtator, and diſtributing each ſhare to the children of the ſeveral brothers and ſiſters, that the eſtate ſhould be equally divided, among all the children of the brothers and ſiſters of the inteſtate, without any regard to the branches of the families. They founded their claim upon the expreſſion in the ſtatute, that on default of parent, brother, or ſiſter, the eſtate ſhould go equally to the next of kin of the inteſtate in equal degree, without ſaying any thing concerning a want of legal repreſentatives; that there was a failure of the perſons deſcribed in the ſtatute, that all the children of the brothers and ſiſters were next of kin in equal degree; that therefore, they were the perſons pointed out by the ſtatute and the will, and ought to ſhare the eſtate per capita, by heads, that is, ſhare and ſhare alike.—

On

[a] Kennedy vs. Kennedy, S. C. 1786.

On the other ſide, it was contended that the ſtatute on failure of lineal heirs, directed the eſtate to deſcend to the brothers and ſiſters of the inteſtate, and their legal repreſentatives ; that the children of the five brothers and ſiſters, repreſented them and ſtood in their places, and were entitled to the ſame ſhares they would have been, had they been living, and of courſe, that the ſucceſſion ought tobe by the roots. The court determined, that the diſtribution of the eſtate ſhould be by the roots. The only doubt that could be, reſpecting the conſtruction of the ſtatute, aroſe from the omiſſion of the words, *legal repreſentatives*, after the words, if their be no parents, brother, or ſiſter, which muſt be intended and underſtood to make the ſtatute conſiſtent, and this may be fairly done, for in the former part of the ſtatute, on failure of lineal heirs the eſtate is to go to the brothers and ſiſters and their legal repreſentatives.— This is a poſitive direction, and it will not do to ſay, that becauſe in making proviſion for the diſpoſition of eſtate among remote collateral heirs, their is an omiſſion of mentioning the failure of certain relations already provided for, that therefore the laſt part of the ſtatute ſhall repeal the former and prevent the eſtate from deſcending to them. It cannot be proper to ſay, that becauſe the words, legal repreſentatives, were not added after parents, brother, or ſiſter, that therefore, the eſtate ſhould not deſcend to the legal repreſentatives of brothers and ſiſters, by the roots, as the ſtatute had before provided. Indeed the ſtatute in making proviſion for the deſcent of eſtates, to the various degrees of kindred, muſt in every advance, ſuppoſe a failure of the heirs to whom the eſtate had previouſly been directed to deſcend. To admit a different conſtruction, and take away the right of repreſentation, would be to allow the uncles of the inteſtate to inherit with the nephews, and nieces, becauſe they are all in equal degree.

This deciſion is oppoſed to the whole current of Britiſh authorities in the conſtruction of the ſtatute of Charles II. for the diſtribution of perſonal eſtate, and from which, this part of our ſtatute is literally copied. [b] The principle which they have adopted is, that where there are ſeveral brothers and ſiſters, and ſome of them are dead, leaving children, then ſuch children by right of repreſentation, ſhall ſtand in the place of their parents, and inherit with

[b] 1 P. Will. 595. 3 Ibid. 50. 2 Vez. 219. 1 Atk. 454, 455.

with their uncles, ſuch part of the eſtate of the inteſtate, as their parents would have been entitled to, per ſtipes: but if all the brothers and ſiſters of the inteſtate are dead at the time of his death, leaving children, that the right of repreſentation does not operate, and ſuch children do not inherit in right of their parents, but as next of kin: in conſequence of which, all being in the ſame degree of kindred, they take equal ſhares per capita, according to the numbers: and if there are any uncles or aunts alive, they being in the ſame degree, with the nephews and nieces, they will take equal ſhares. But if one of the brothers or ſiſters had been living, then the right of repreſentation might have operated.

The deciſion of our courts is as correct, and a more juſt, and equitable conſtruction of the ſtatute, than that of the Britiſh courts. The ſtatute intended particularly to mark brothers and ſiſters, and their legal repreſentatives, as a branch of relations, who were to inherit by force of poſitive law, and not merely as next of kin.—The eſtate is therefore given to them collectively. If all the brothers and ſiſters are alive, they can have no repreſentatives. If any are dead, their children ſtand in their place and repreſent them, if all the brothers and ſiſters are dead, then the eſtate is given to their children as repreſentatives, by force of which they are to take as ſtanding in the place of their parents, and not by proximity of blood. I can ſee no reaſon why, on the death of all the brothers and ſiſters, their children cannot repreſent their parents, and take their ſhares, as well as they can, when only part are dead. The children of the deceaſed brothers and ſiſters, are their repreſentatives whether all or part of the brothers and ſiſters are dead, and it is by the deſcription of legal repreſentatives, that they are to take the eſtate: and upon legal principles, the grand children might have been admitted by right of repreſentation, had not this been expreſsly taken away by the ſtatute. I know not by what principle of common ſenſe, or rule of logic, it can be ſaid, that children do not repreſent their parents, unleſs ſome of their uncles are alive. If it is equitable that the children of deceaſed brothers and ſiſters, ſhould by right of repreſentation ſtand in place of their parents, and ſhare the eſtate of their deceaſed uncle with their ſurviving uncles, to the excluſion of the uncles of the inteſtate, is it not equally right, that

that in caſe all the brothers and ſiſters of the inteſtate are dead leaving children, that ſuch children by right of repreſentation, ſhould take the eſtate of the inteſtate, to the excluſion of the uncles to the inteſtate?

VI. The ſixth general rule is, that on failure of lineal heirs and brothers and ſiſters, and their legal repreſentatives, the eſtate acquired by actual purchaſe or by gift, or deviſe, from ſome perſon not of kin to the inteſtate, ſhall go to his parent or parents.

This rule of deſcent, is warranted by the ideas of mankind on the ſubject. We feel that there is juſtice and propriety in giving the eſtate of a child, dying without iſſue, and leaving no brethren, to the parents, who have had the care, trouble and expenſe of his ſupport, in preference to ſome remote branch of the family, who never have performed ſuch ſervices for the inteſtate, and probably had no more connexion with him, than with utter ſtrangers. The oppoſite doctrine of the Engliſh law, that eſtates never ſhould aſcend, has ever been complained of as a hardſhip, and injuſtice; and it is a pleaſing proſpect to obſerve, that our country has riſen ſuperior to the prejudices which are uſually entertained in favour of long eſtabliſhed inſtitutions, however impolitic, and have adopted rules which are founded in the principles of juſtice, and the maxims of good policy.

If the father, and mother be living, the eſtate will aſcend to them and they will take as joint-tenants. If either be dead, the ſurvivor will take the whole.

VII. The ſeventh rule is, that where there are no lineal deſcendants or brothers and ſiſters, or their legal repreſentatives of the whole blood, or parents, then the eſtate acquired as mentioned in the laſt rule, ſhall deſcend to the brothers and ſiſters of the inteſtate of the half blood, and their legal repreſentatives.

By the Engliſh law, eſtates deſcend to collateral relations, in the remoteſt degree, in preference to the brother of the half blood. The hardſhip and injuſtice of this regulation, has been the ſubject of much cenſure and diſapprobation, and Blackſtone, whoſe partiality for the Engliſh law is very great, cannot juſtify it, even upon

feudal principles. It is much more natural and eaſy, for legiſlators who are framing new ſyſtems, to avoid the errors that have been interwoven into preceeding ſyſtems, than it is to correct old errors which have grown venerable by the lapſe of time. The Engliſh Parliament have no idea of mending this defect in their code of laws, while we have prudently avoided the introduction of it into our own.

There need nothing more be remarked for the explanation of this rule. It muſt be obſerved, that in the ſtatute the words, *and thoſe who legally repreſent them*—inſtead of being placed next after the clauſe, directing the eſtate to deſcend to the brothers and ſiſters of the half blood of the inteſtate, were by a miſtake in the printing, placed next after the clauſe directing the eſtate on failure of parents, brothers and ſiſters, to deſcend to the next of kin to the inteſtate in equal degree. This miſtake is extremely evident: it is apparent from the general tenor of the ſtatute, that it was intended that the repreſentative of the brethren of the half blood, ſhould inherit as well as of the whole blood, and it is expreſsly determined by the ſtatute, that the right of repreſentation ſhall be taken away after brothers and ſiſters children, and yet at the ſame time the ſtatute direct, that the eſtate ſhall go to the legal repreſentatives of the next of kin, on failure of parents, brothers, and ſiſters. This is a manifeſt contradiction in the ſtatute: but all is reconcileable upon placing the words, *and thoſe who legally repreſent them* in the manner above mentioned, next after brethren of the half blood.

VIII. The eighth and laſt general rule is, that on failure of lineal deſcendants, brothers and ſiſters of the whole and half blood, and their legal repreſentatives, repreſentation among collaterals, being excluded after brothers and ſiſters children, and parents, then the eſtate acquired by actual purchaſe, or by gift or deviſe, from ſome perſon not of kin to the inteſtate, ſhall deſcend in equal ſhares, to the next of kin to the inteſtate, in equal degree, with this reſtriction, that kindred of the whole blood, ſhall take in preference to kindred of the half blood in equal degree, and with the excluſion of the right of repreſentation.

When we come to the application of this rule, it is to be remarked

ked that the parents of the inteſtate, his brothers and ſiſters of the whole and half blood, and their children, (repreſentation among collaterals being no further admitted,) are dead. We then are to ſearch for the next of kin, in more diſtant and collateral degrees. It is poſſible that his brothers and ſiſters may be dead, and all their children, but there may be grand children of his brothers and ſiſters, who are great nephews and neices, to the inteſtate, and related to him in the fourth degree. But if the inteſtate had grand parents, they are in the ſecond degree, and will next inherit. If he had any uncles or aunts who ſurvived him, or great grand parents, they are nearer of kin than great nephews, and neices, being in the third degree of conſanguinity, and of courſe will inherit in preference to them. If there be uncles of the whole and half blood, the uncles of the whole blood only will inherit, for the rule is, that among kindred in the ſame degree, the whole ſhall be prefered to the half blood; but if the uncles of the whole blood are dead, leaving children, the uncles of the half blood, ſhall inherit in preference to them; becauſe in collateral deſcent, the half blood in a nearer degree is always prefered to the whole blood in a remoter degree. If ſome of the uncles are living and ſome dead, leaving children, they cannot repreſent their father, and take his ſhare of the eſtate, for in this ſtage of collateral deſcents, the right of repreſentation is taken away, and the whole eſtate will go to the ſurviving uncles.

If all the uncles, and aunts of the inteſtate are dead, leaving children, they will ſtand related to him in the fourth degree; and if he has great nephews and neices, they being in the ſame degree, they will all inherit together, by the heads, or per capita, and take his eſtate in equal ſhares. If there be any great uncles and aunts alive, they are in the fourth degree alſo, and will inherit equally with them.

This doctrine of our law of deſcents which excludes great nephews, and nieces, or the grand children of brothers and ſiſters from ſtanding in the place of their parents, and inheriting the eſtate of their great uncles, by the right of repreſentation, and which of courſe gives a preference to the uncle of the inteſtate, and equal ſhares to couſins, appears to me not founded in the

principles of nature, or conformable to the dictates of juſtice, and policy. The deſcendants of a brother or ſiſter, tho more remote in degree, yet as they proceed from a nearer ſtock than uncles, will always be conſidered in a more peculiar ſenſe, to belong to one's family, and will claim a larger ſhare of affection and attachment: and I will appeal to the heart of every man, whether in caſe of dying inteſtate, he would not chuſe that his eſtate ſhould deſcend to the grand children of a brother or ſiſter in preference to its going to an uncle or an aunt, or being equally divided with couſins. The law therefore, inſtead of taking away the right of repreſentation after the children of the brothers and ſiſters of the inteſtate, ought to take it away after the deſcendants of brothers and ſiſters. This would adopt a rule conſonant to the principles of equity, and the dictates of affection, that in the firſt place, the lineal deſcendants, muſt be exhauſted, and all the collateral deſcendants flowing from the father of the inteſtate, which peculiarly conſtitute his family, before we advance to a more remote ſtock, from whence we derive branches that can inherit. But a commentator on the laws, muſt take the laws as he finds them.

By the Engliſh law the male branch of the family, is always prefered to the female, and recourſe is never had to the female, till the male branch has become extinct. But our law makes no diſtinction in the right of ſucceſſion, between the male, and female branch: and as the ſtatute ſays generally, that the eſtate muſt go to all who are next of kin in equal degree, we muſt take the male, and female branches of families, hand in hand.

We have already traced the deſcent of eſtates to the fourth degree, comprehending great uncles, couſins, and great nephews, and nieces. On this extinction we muſt take a wider range, and all who are in the fifth degree to the inteſtate, will inherit in equal ſhares: and then on their extinction to the ſixth degree, and in like manner till the heir be diſcovered. In this manner we might aſcend, if it were poſſible for human beings to know all their kindred, from one ſtage of families to another, thro' all the ſucceſſive ages, that have rolled away ſince the creation of man, for the purpoſe of diſcovering all the ſtreams of inheritable blood, by

which

TABLE OF DESCENTS.

Paternal Line — *Maternal Line*

Walter Stiles *Paternal Gr. Father*	Christiana Smith *Paternal Gr. Mother*	Luke Lempe *Paternal Gr. Father*	Frances Holland *Paternal Gr. Mother*	Robert Baker *Maternal Gr. Father*	Hannah Willis *Maternal Gr. Mother*	James Thorpe *Maternal Gr. Father*	Emma White *Maternal Gr. Mother*
Great Uncle and Aunt *Issue of W. C. Stiles* 10	George Stiles *Paternal Gr. Father* 7	Cecilia Kempe *Paternal Gr. Mother*	*Great Uncle and Aunt* *Issue of L. F. Kempe*	*Great Uncle and Aunt* *Issue of R. H. Baker* 10	Andrew Baker *Maternal Gr. Father*	Esther Thorpe *Maternal Gr. Mother* 7	*Great Uncle and Aunt* *Issue of J. E. Thorpe* 10
William *Paternal Uncle* 9	Emma Stiles *Paternal Aunt*	David Stiles			Lucy Baker	Henry Baker *Maternal Uncle* 8	Jane *Maternal Aunt* 9
Richard *Paternal Cousin* 10							Edward *Maternal Cousin* 10 / Martha *Maternal Cousin* 10
Mary	Thomas Stiles *Brother* 3		*Paternal*			Hannah Stiles *Sister* 3	Jonah *Maternal half brother*
Robert	Ruth	Daniel Stiles *Eldest son* 1	Timothy Stiles *Brother* 1		Anne Stiles *Daughter* 1	Frank *Nephew* 1	
Anna	Jonathan / Benjamin *Nephew*	Enos *Grandson*	Alice *Gr. Daughter*	Eliza *Gr. Daughter*	James *Grandson*	Luke *Gr. Son*	Hope *Gr. Daughter* / Sarah *Gr.*

which the degrees of propinquity among the ſons of men may be aſcertained. In this progreſſive reſearch, every man muſt find perſons that might inherit his eſtate; for all the nations of the earth are related together. But to aſcertain the degrees of conſanguinity between all the inhabitants of the globe, would be a labour that omniſcience only could accompliſh. Men in a few generations loſe the knowledge of their remote kindred, and eſtates ſometimes eſcheat, from the impoſſibily of aſcertaining the perſons, who are the legal heirs.

I ſhall next exemplify theſe rules by the Table of Deſcents. John Stiles the inteſtate and proprietor of the lands in queſtion is the propoſitus, or the ſtock from whence the degrees of kindred are to be computed. In the firſt place, Daniel, Timothy, and Amie his ſons, and daughter ſucceed him. (No 1.) If Timothy be dead, his two daughters, (No 2.) Alice and Elizabeth will ſhare by the right of repreſentation, one third of the eſtate with Daniel and Amie. If all the children be dead, then the grand children will inherit the whole eſtate, by the root, that is, Enos the ſon of Daniel will take one third, Alice and Elizabeth the daughters of Timothy, take one third, and James, Luke, and Hope, the children of Amie, take the other third. (No 2.) If Enos ſhould be dead leaving a ſon, by the right of repreſentation he could ſtand in the place of his grand father Daniel, and take one third. If there be no lineal deſcendants, then Thomas Stiles the brother, and Hannah Stiles the ſiſter of John Stiles, of the whole blood will ſucceed. (No 3.) But if either be dead, their children will ſucceed by right of repreſentation. So if both be dead their children will ſucceed, being the nephews, and nieces of John Stiles, and will take the eſtate by roots. (No 4.) If there be no nephews, or nieces, who are children of the brother and ſiſter of the whole blood, then the eſtate will aſcend to David Stiles the father, and Lucy Barker the mother if both are living, as joint-tenants, if either be dead to the ſurvivor. (No 5.) If they are dead then to the half brothers and ſiſters of John Stiles, (No 6.) and their legal repreſentatives, ſubject to the ſame reſtriction, as in caſes of the whole blood. If they are dead then the eſtate will aſcend to all the paternal, and maternal grand parents, who are in

the

the ſecond degree. (No 7.) If they are dead, the eſtate will go to thoſe who are related in the third degree. There are great grand parents, uncles, and aunts, of the whole blood: (No 8.) but if they are dead, then to the uncles, and aunts by the half blood. (No 9.) If they are dead, then to great uncles, and aunts, couſins, and great nephews and nieces, who are in the fourth degree. (No 10.) Here it muſt be underſtood, that all the collateral heirs where there are ſeveral, take per capita, or by the heads, and that if there is one only in any degree, he will take the whole eſtate. If theſe relations are all dead, then the eſtate will deſcend to thoſe who are in the fifth degree of kindred; who are great great uncles, and aunts, the children of great uncles, of couſins, of great nephews, and nieces. On the extinction of relations in the fifth degree, we muſt proceed to the ſixth, and ſo in ſucceſſion till we find the heir. In paſſing from one degree to another more remote in collateral kindred, we muſt in order to find all the perſons who ſtand in the ſame relation, not only deſcend one degree lower among the ſeveral ſtocks, or families, which have before been purſued for heirs but we muſt alſo aſcend one ſtock, or grade higher: becauſe equal degrees of kindred may be found in both directions, and tho one ſtock may be more remote than another, yet the proximity to it may make the degree of kindred the ſame. Thus the children of great great uncles, the grand children of great uncles, and the grand children of couſins, are all in the ſame degree of relation, tho not equally diſtant from the ſtock, in the courſe of lineal aſcent. Every new ſtock to which we aſcend multiplies the chance of diſcovering heirs, becauſe it encreaſes the ſtock from which branches may iſſue, in proportion to the increaſe of lineal anceſtors.

If the land was received by deſcent, gift, or deviſe from ſome anceſtor, or kindred of the inteſtate, then on extinction of lineal heirs, to be diſcovered as has been mentioned, and of brothers, and ſiſters of the blood of the perſon from whom the land came, we muſt for the purpoſe of finding the other collateral heirs, take the perſon from whom the eſtate came, and conſider him as the propoſitus, in the ſame manner we did John Stiles; and then all

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the collateral heirs of ſuch perſon, will be the collateral heirs of the inteſtate, of the blood of the perſon from whom the land came, and the eſtate by law will deſcend to ſuch perſon among them, as is of neareſt kin to the inteſtate.

Such is our law of deſcents, but before I cloſe this ſubject, let us compare it with the Engliſh, and Imperial codes, the moſt celebrated that have ever been eſtabliſhed. The rules of the Engliſh law are,--1. That inheritances ſhall lineally deſcend to the iſſue of the perſons laſt ſeiſed in infinitum, but ſhall never lineally aſcend. 2. That the male iſſue ſhall always be admitted before the female. 3. That where there are two or more males in equal degree, the eldeſt only ſhall inherit, but the females altogether. 4. That lineal deſcendants in infinitum ſhall always repreſent their anceſtor and ſtand in the ſame place he would have done, had he been living. 5 That on failure of lineal deſcendants, the inheritance ſhall deſcend to the blood of the firſt purchaſer, ſubject to the preceeding rules. 6. That the collateral heir of the perſon laſt ſeiſed, muſt be his next collateral kinſman of the whole blood. 7. That in all collateral inheritances, the males ſtock, ſhall be prefered to the female, unleſs where the lands have in fact deſcended from a female. c The rules of the Imperial law as promulgated by the Emperor Juſtinian are, 1. That all the lineal deſcendants of the inteſtate, whether male, or female, and their legal repreſentatives ſhall inherit his eſtate in equal ſhares. 2. That where there are no lineal deſcendants, then the aſcendants, as parents and grand parents, are prefered to all collaterals except brothers, and ſiſters, of the whole blood; but if there be no ſuch brothers and ſiſters, then all the aſcendants in the neareſt degree ſhall inherit in preference to remoter degrees, whether male or female, paternal, or maternal; and if ſeveral degrees concur, the inheritance muſt be equally divided between the paternal, and maternal aſcendants. 3. If there be brothers and ſiſters of the whole blood, they ſhall be conſidered as the neareſt aſcendants and the eſtate ſhall be equally divided among the brothers, and ſiſters, and the aſcendants, according to the number of perſons. 4. If the inteſtate leave neither deſcendants, nor aſcendants, then the eſtate ſhall be equally divided among the brothers and ſiſters of the whole blood,

and

c Juſtinian Nov. CXVIII Chapters 1, 2, 3.

and their children by the right of repreſentation. 5. On failure of brethren of the whole blood, and their children, brothers of the half blood ſhall inherit. 6. The right of repreſentation among collaterals, is allowed no further than to brothers and ſiſters children. 7. Where there are no deſcendants, aſcendants, brothers, or ſiſters, or brothers or ſiſters children, the eſtate deſcends to all collaterals in equal ſhares that are of neareſt kin to the inteſtate, in equal degrees.

Tho our law of deſcents, bears a great reſemblance to the Imperial law, yet it may juſtly be deemed a great improvement upon it: but when we compare it to the Engliſh law, which is of feudal origin, the ſuperiority is very manifeſt: and we may venture to aſſert that it is the moſt liberal, and equitable ſyſtem of hereditary ſucceſſion, that ever was adopted, and the moſt conſonant to the laws of nature. The odious and unjuſt doctrine of primogeniture, ſo well calculated to aggrandize the families and ſupport the pride of feudal ariſtocracy, is wholly exploded. Parents may inherit the eſtate of their inteſtate ſons, when it was acquired by purchaſe or by gift, or deviſe from a ſtranger; and brothers of the half blood ſhall not be excluded by collateral kinſmen in remote degrees. The female ſex are placed upon the ſame footing with the other ſex, in reſpect of their ſucceſſion to property.

Chapter Sixteenth.

Of TITLE BY DEED.

IN the preceeding chapter, we explained, and illuſtrated the rules of deſcent according to our law. We next come to contemplate the various modes of acquiring titles to real eſtates by purchaſe.

[d] Purchaſe in its moſt extended legal ſignification, comprehends every method by which real property can be acquired, excepting deſcent; and is ſaid to be the acquiſition of a title by a man's own act, and agreement, and not by the mere operation of law. The diſtinction

[d] Co. Litt. 18. 2 Black Com. 241.

diſtinction between a title acquired by purchaſe and by deſcent, is very apparent. The latter muſt be an eſtate coming from ſome anceſtor, and veſting in the heir, according to certain rules eſtabliſhed by law. But where a proprietor in fee deviſes his eſtate to his heirs at law, to hold in the ſame manner and proportion, as if no deviſe had been made, they ſhall be conſidered as taking by deſcent. Purchaſe is where the title is obtained in ſome manner different from deſcent. Thus a title obtained by the levy of an execution, by deviſe, or poſſeſſion is as much a title by purchaſe as where the full conſideration is paid in money, and a deed of bargain and ſale executed. So are mere gifts for the conſideration of love and good will, or blood and affection.

The difference between eſtates acquired by purchaſe and deſcent are, that the heirs who have received eſtates from their anceſtors, are obliged to fulfil his covenants and contracts, to the value of the eſtate that deſcended to them. By the Engliſh law, an action on a contract, ſuch as a bond, which binds the heirs, may be maintained againſt the heirs, as well as executors—but by our law no action for a debt will lie againſt the heir, tho bound by the covenant, but againſt the executors or adminiſtrators only; for all the debts of the deceaſed are diſcharged, before a diſtribution to the heirs: and for that purpoſe, the real as well as perſonal eſtate may be applied by the executor or adminiſtrator. But on covenants of ſeiſin and warranty, where the breach may happen after the death of the covenantor, and ſettlement of the eſtate, action will lie againſt the heirs, as in caſe of eviction, and they will be liable to the amount of the eſtate received by deſcent.

There are ſeven ways of acquiring titles to real eſtate by purchaſe, which are, by deed, by deviſe, by execution, by poſſeſſion, by eſcheat, by forfeiture, and by acceſſion, and of theſe we ſhall treat in their order.

The aquiſition of real eſtates by deed, is the moſt univerſal method in practice, and correſponds to the common ideas of purchaſe in its limited ſenſe. This is alſo called alienation, and denotes the tranſmiſſion of eſtates from one proprietor to another, by a volun-

tary conveyance, upon a mutual contract, for a valuable conſideration. The idea of a voluntary agreement in both parties, attends the alienation of eſtates, and where ſuch agreement cannot be ſuppoſed, the conveyance cannot be called an alienation: but in common language, we make uſe of the words, purchaſe, or bargain and ſell, and rarely of the word alienation.

In treating of deeds, we ſhall firſt point out their general nature, and then the ſeveral kinds. A deed is defined to be a writing, ſigned, ſealed and delivered by the parties, containing a contract or agreement between them for the ſale of lands. For a compleat illuſtration of this ſubject, it is neceſſary to attend to the ſeveral requiſites to conſtitute a deed; and then to the manner how ſuch deed may be defeated or deſtroyed.

1. A deed muſt contain in legal and proper order, ſufficient words to evidence the intention and agreement of the parties, to render it obligatory. There is however no particular form, that is abſolutely neceſſary to conſtitute a deed, nor need all the parts which commonly compoſe a deed be uſed, provided there be ſufficient words to expreſs with clearneſs and certainty, the meaning of the parties. There is however a particular form, which has been adopted, and practiſed upon in this ſtate, which conveys the meaning of the parties in the cleareſt and moſt effectual manner with the greateſt ſimplicity and conciſeneſs; which has been confirmed, by immemorial uſage, and ſanctioned by the wiſdom of ages. It is therefore the ſafeſt method in conveyances, to make uſe of this eſtabliſhed form, and not riſque the deciſion of courts upon the legality of any new fangled modes of conveyance. In treating of the general requiſites of a deed, it is neceſſary to keep in view the common form. I ſhall therefore in explaining the general principles of conveyancing, exhibit the compleateſt and moſt perfect form of a deed.

2. A deed muſt be in writing or printed. It may be written in any character or language, but muſt be on paper or parchment. Lands originally were conveyed by parole—But the uncertainty of parole-contracts, and their tendency to introduce frauds and perjuries

[a] Statutes, 250.

juries, has induced the legiſlature *e* to nullify verbal conveyances and to require them to be reduced to writing, to render them valid.

3. There muſt be parties capable of contracting, and of being contracted with, who muſt be ſufficiently and properly deſcribed—and in this place we ſhall conſider the perſons who are capable of making contracts reſpecting lands.

In the firſt place, it may be remarked, that every proprietor of lands who is in poſſeſſion, is capable of alienating them, unleſs reſtricted by ſome legal diſability, or diſqualification, and that there are ſome perſons who are laid under ſuch diſabilities by law that they are incapable of acquiring lands by purchaſe. *f* Idiots, and perſons of non-ſane memory, or diſtracted perſons, infants, and perſons under dureſs are not wholly incapable of conveying and purchaſing lands; for their conveyances or purchaſes are not abſolutely void, but merely voidable. But this ſubject will be amply diſcuſſed, when we treat of contracts reſpecting perſonal property, and therefore nothing further need now be remarked.

g A married woman may purchaſe an eſtate without the conſent of her huſband, and the conveyance is valid during the marriage, unleſs he avoids it by ſome act declaring his diſapprobation of the bargain: but if the huſband never avoids it, or conſents to it, the married woman may after the death of the huſband diſagree to and avoid it. So may her heirs if ſhe dies before her huſband, or if during her widowhood, ſhe does not expreſsly ratify and confirm the contract. But every other contract of a married woman, (excepting where ſhe joins with her huſband in a conveyance of lands, holden in her right,) is not merely voidable, but abſolutely void.

Foreigners or aliens, are incapable to purchaſe or hold lands in this ſtate, by force of ſtatute, which declares, that no perſon who is not a citizen or inhabitant of this ſtate, or one of the United States of America, ſhall be capable of purchaſing or holding any lands within this ſtate, without ſpecial licence from the aſſembly. This ſtatute is conformable to the common law of England; but in

e Statutes 250. *f* 2 Black. Com. 291. *g* Ibid. 292.

in the firſt ſettlement of this country, our anceſtors, tho they adopted the greater part of the common law of their native land, did not admit this principle, becauſe in a new country, it was neceſſary to encourage ſettlers, by holding out every advantage. But when the ſtate had become fully ſettled and under improvement, it was thought proper to exclude foreigners from holding or purchaſing our lands.

Executors and adminiſtrators may be empowered by the court of probate, to ſell lands for the payment of debts, where neceſſary, if the eſtate be not inſolvent, if it be inſolvent, all the lands are ſold by direction of the court of probate.

It is a general rule, that to enable a perſon to alien his lands he muſt be in actual poſſeſſion either by himſelf, or ſome perſon under him, or the conveyance muſt be made to ſome perſon in actual poſſeſſion. For where a perſon has the right of poſſeſſion and property, and a diſſeiſor is in actual poſſeſſion, the proprietor has not in legal conſideration, a compleat title; he cannot therefore convey to any perſon, but the diſſeiſor, who has that part of the title in which the diſſeiſee is deficient. But this muſt be underſtood to be where the perſon in poſſeſſion claims to hold the land by an adverſary title, and not under the proprietor. If the poſſeſſor, be in under the actual proprietor, then his poſſeſſion is the poſſeſſion of the proprietor, who may ſell to a ſtranger. So if one perſon ſell to another, who ſells to a third, the firſt continuing in poſſeſſion, yet the laſt conveyance is good, becauſe the firſt ſeller cannot claim to hold the land againſt his own warranty. The reaſon of the law is, that it is improper and dangerous to permit pretended and diſputed titles to be bought and ſold; which would in reality be a tranſference of law ſuits from one perſon to another, and be a great encouragement to the propenſity to litigation, too natural among mankind. For a man of large property and keen paſſion for contention, might buy up ſuch pretended titles and fill the country with litigious and vexatious ſuits. [b] Such has been the common law of England, and in this ſtate, by the ſtatute to prevent frauds, quarrels, and diſturbances in bargains, leaſes and other alienations of lands, it is declared, that no poſſible mode of conveyance, of any kind of eſtate in things real, ſhall be good and effectual

[b] 2 Black. Com. 290.

effectual in the law, where the perſon conveying is diſſeiſed or out of poſſeſſion, unleſs the conveyance be made to the perſon in actual poſſeſſion. Such conveyance is deemed abſolutely void, and therefore the property remains in the perſon who attempts to ſell, who may notwithſtanding ſuch conveyance, bring his action in his own name, and recover the poſſeſſion. It has therefore been practiſed in theſe caſes, for the perſon to whom the conveyance is made, to bring forward an action in the name of the perſon of whom he purchaſed, againſt the perſon in poſſeſſion, and on recovery and obtaining poſſeſſion, he may by force of the covenants contained in his deed, hold the lands againſt the perſon of whom he purchaſed. *i* But executors and adminiſtrators who ſell lands by order of the court of probate, are not within the reaſon or letter of the ſtatute, for they act in right of others, and cannot be ſaid to be ſeiſed or diſſeiſed of lands.

Reverſions and veſted remainders, may be transfered, becauſe the poſſeſſion of the particular tenant is deemed in law, the poſſeſſion of him in remainder and reverſion. Therefore, tho a man has given a leaſe of his lands, he may before the expiration of the leaſe, execute a conveyance to another perſon, of the reverſion dependent on the termination of the leaſe: yet contingencies and mere poſſibilities, tho they may be releaſed or deviſed, or may paſs to the heir or executor, cannot be aſſigned to a ſtranger, unleſs coupled with ſome preſent intereſt.

4. To render a deed valid and effectual, it is neceſſary that there be a good or valuable conſideration, for if there be no conſideration the deed is of no force; being conſtrued to enure for the benefit of the grantor only. A good conſideration is ſaid to be that of blood, or of love and natural affection. Undoubtedly a voluntary gift, on motives of friendſhip would be good, tho in ſuch deeds it is uſual to expreſs an additional conſideration of ſome ſmall ſum of money, which is a ſufficient conſideration againſt the grantor, but all conveyances merely on what the law calls good conſideration, may be ſet a ſide, in favour of bona fide creditors. A valuable conſideration, is for money, marriage, or the like, where there

i Barney vs. Cutler, &c. S. C. 1793.

there is an equivalent given by the purchaſer. Such conveyances executed bona fide, cannot be vacated in favour of creditors.

A deed that is founded upon a uſurious contract is void, and ſo are all conveyances that are executed by fraud or colluſion, with an intent to cheat or deceive honeſt purchaſers and lawful creditors. The ſtatute againſt fraudulent conveyances, declares, that all fraudulent and deceitful conveyances of lands, tenements, and hereditaments, ſhall be utterly void, notwithſtanding any pretence or feigned conſideration, excepting between the fraudulent parties.

5. There muſt be a ſubject matter or ſomething which is contracted for, and ſold, which muſt be ſufficiently and properly deſcribed. Thus, it is eſſential that the land intended to be conveyed, be ſo located, butted, bounded and deſcribed in the deed, as that it can be known where it lies, and be diſtinguiſhed from any other tract of land; or there muſt be ſuch reference to ſome known and certain deſcription, as will reduce the matter to a certainty. Thus a reference in one deed, to ſome other deed or thing, by which the deſcription can be known with certainty, is good and ſufficient.

6. The deed muſt alſo aſcertain the quantity of intereſt, or kind of eſtate which is granted. This may be done in the premiſes, or when the parties are firſt deſcribed, but is uſually reſerved for the province of the words *to have and to hold*. But if the kind of eſtate be determined in the firſt part of the deed, any ſubſequent variation will not alter it. For inſtance, if lands be granted to a perſon and his heirs and aſſigns forever, to have and to hold to him for life, and then to another in fee, he ſhall take an eſtate in fee, by the firſt expreſſions, and which cannot be altered by any ſubſequent words in the deed: for the firſt words create the eſtate, and the rule in conſtruing deeds is, that the firſt words ſhall operate. But the uſual method is not to limit or define the eſtate, till we come to the words, *to have and to hold*, and then it is done by limiting it to a certain perſon and his heirs and aſſigns forever, or to a certain perſon during life, or for years, and then to ſome other perſon according to the nature of the eſtate to be conveyed. The expreſſion *to hold*, has no ſignification in our deeds. In early times, it was uſed in England to deſignate the ſpecies of tenure by

which

which the lands were to be holden, as by knight's ſervice, or ſoccage, or of the capital lords of the fee. But in this ſtate, as all our landholders have an allodial title, they cannot be ſaid to hold of any perſon. But as this word was originally uſed in conjunction with the word, *to have*, it has been continued to be uſed without annexing any meaning to it, and in violation of the rules of propriety.

7. We next conſider any terms, ſtipulations, reſervations or conditions that may be annexed to a deed. In England, while the feudal ſyſtem was in force, there was alway a reſervation of ſome rent, either in certain ſervices to be performed, or money to be paid, according to the nature of the eſtate. Our lands are not incumbered with any ſuch ſlaviſh reſervations; but the parties may and very frequently do, make reſervation of rent in leaſes. Grantors frequently reſerve to themſelves ſome right, privilege, or benefit in the granted eſtate. If the eſtates be dependent on ſome condition, then a clauſe pointing out the contingency, will be inſerted, and if the condition be not fulfilled, then the eſtate to remain in the grantee, otherwiſe to be defeated: but if the grantee hold on condition of performing certain conditions, then on failure to revert to the grantor.

8. Deeds uſually contain certain covenants, which are denominated covenants of ſeiſin, and warranty: for the grantor warrants to the grantee, that at, and until the enſealing of the deed, he is well ſeized of the premiſes, that he has good right to ſell in ſuch manner, as he in fact does ſell, and that the ſame is free form all incumbrances. He then proceeds to bind himſelf, to warrant and defend againſt all claims and demands. In theſe covenants of ſeiſin and warranty, the grantor uſually binds himſelf, his heirs, executors, and adminiſtrators, which are therefore denominated covenants real, and will deſcend upon the heirs, executors, and adminiſtrators, who are liable to fulfil the ſame, ſo far as they have eſtate, or aſſets, which deſcend to, or come into their hands; in which caſe they ſtand upon the ſame footing as the grantor: but if they receive no eſtate, then they are under no obligation to fulfil ſuch covenants. The difference between the covenants of ſeiſin, and of warranty, is this. An action may at any time be

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brought by the grantee againſt the grantor, if he had no legal title to the land, at the time of the ſale, without waiting for a trial at law, to decide the title, or an eviction. Thus if a man conveys to another, lands to which he has no title, the grantee may inſtantly bring his action upon the covenant of ſeiſin, for the grantor has broken his covenant, becauſe he is not ſeized according to it. But where the grantee obtains poſſeſſion of the premiſes, and is evicted by ſome perſon who has the legal title, then an action lies upon the covenant of warranty. It is the uſual practice when an action is brought againſt a perſon to recover the land in his poſſeſſion, to notify, or cite the grantor, who is called the warrantor or voucher, or his heirs, to come in, and defend in the action; and in caſe the grantee be evicted of the lands, then the voucher, or his heirs, on an action brought againſt him or them, on the covenant of warranty, cannot be admitted to conteſt ſuch judgment, but ſhall reſpond all damages: but if the grantor, or his heirs, be not cited, then in an action brought on the covenant of warranty, they may contend the prior judgment; but if it be found that the grantor had not the title of the land, the grantee will recover his damages and coſts.

[1] Where land is tranſmitted from ſundry perſons, with uſual covenants, and the laſt purchaſer is ouſted by reaſon of the defective title of the grantors, and his immediate grantor is a man of no property, and unable to make good his covenants, then the laſt purchaſer may call upon either of the antecedent grantors, who is able, and compel them to reſpond damages, becauſe in deeds the covenants run to the grantee, his heirs and aſſigns.

[m] To conſtitute an expreſs covenant of warranty, the word *warrant*, muſt be uſed; to bind the heirs, the word *heirs* muſt be inſerted; to enable the aſſignee of the grantee to maintain an action on the covenant of warranty againſt the grantor, the word *aſſigns* muſt be in the deed.

[n] There are alſo implied warranties, or warranties in law. In partition, or exchange of lands, a warranty is implied. So in a leaſe of lands for a conſideration paid, or reſerving rent, the law implies a warranty. In a feoffment, or deed in fee, by the words,

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[1] Co Lit. 384. [m] Ibid. [n] Ibid.

o I have given, the feoffor only is bound to the implied warranty, and not his heirs, by the common law of England. *p* Before the ſtatute which prohibited the ſubinfeudation of lands, if a man had given lands by the expreſſion, *I have given*, to have and to hold, to him and his heirs of the donor, and his heirs, by certain ſervices, then the donor and his heirs were bound to the implied warranty: but if the lands were given to be holden of the chief lord, then the donor was bound only during life. For in theſe caſes, the contract is perſonal and while the conſideration is continuing by the performance of ſervices, the warranty continues even to the heirs; but when the tenure reſulted back to the ſuperior lord, the contract being perſonal, there was no conſideration to extend it to the heirs. In this ſtate there can be no queſtion, but that the feoffor is perſonally liable in a deed in fee, with the words, *I have given*, upon the general implied warranty, even if the deed contains a ſpecial warranty againſt all claims from him, or his heirs; but it is a queſtion how far the heirs are liable. Where eſtate deſcends from the anceſtor to the heirs, ſufficient to fulfil ſuch warranty, there ſeems to be the ſame reaſon to render them liable, as there was in England, at the time when lands were conveyed to a perſon and his heirs, to hold of the donor, and his heirs, by certain ſervices. For the anceſtor has received the property of the douee, and has left property to deſcend to his heirs, ſufficient to make good the warranty.

q Warranties extend not only to the title, but to the quantity of land contained in the deed. If however, the quantity be left uncertain, as where it is expreſſed, be the ſame, more or leſs, there is no warranty. So where there was a conveyance of a tract of land ſaid to contain one hundred and ten acres, deſcribed by metes and bounds, the fact was, the ſeller owned all the land within the deſcribed bounds, but there was only ninety acres. In an action on the covenant, the court decided that the warranty only extended to the bounds, and not to the quantity, and that the plaintiff ought either to have meaſured the land, or had an expreſs warranty with reſpect to the quantity.

9. The concluſion of the deed ought to mention the date, or the time of its execution and delivery, either expreſsly or by reſe-

o dedi. *p* Quia emptores terrarum. Co. Lit. 384. *q* Snow vs. Chapman, S. C. 1793.

rence to ſome time before mentioned. A deed however, which has no date, or a falſe or impoſſible date is good, provided the real day of the date or delivery can be proved: for a deed does not derive its force from the date, but from the delivery.

10. It is requiſite that the deed be read, when any of the parties deſire it: and if it be not done it is void as to him. The ſubſcriber to the deed, ought to read it himſelf, if he can, but if he be blind or illiterate, then another perſon muſt read it to him. If the deed be read falſely, it will be void at leaſt, ſo much as is read falſely; unleſs it be read falſely, by colluſion, and on purpoſe to avoid it: and then it ſhall be binding as far as it reſpects the perſons, that are knowing to the fraud and colluſion, but no further.

11. A deed muſt be ſubſcribed by the grantor, and atteſted by two witneſſes—for the ſtatute enacts, [r] that all grants, bargains, ſales, and mortgages of houſes and lands, muſt be in writing, and ſubſcribed by the grantor with his own hand or mark, unto which mark his name ſhall be annexed, and alſo atteſted by two witneſſes with their own hands or marks, unto which marks their names ſhall be annexed.

[ſ] It has been adjudged, that where the grantor directs another perſon to write his name, or where his hand is guided by another in writing his name, it is a ſigning of the deed within the ſtatute, and valid to convey the eſtate. It is the univerſal practice, to ſeal deeds, as well as to ſign them. Tho this is not expreſsly required by ſtatute, yet as by the common law, a deed is conſidered to be an inſtrument under hand and ſeal, and ſealing deeds having been always practiſed, it may now be deemed an eſſential requiſite, tho it muſt be acknowledged at preſent, to be nothing more than an unmeaning formality, and ought to be aboliſhed.

12. To make a deed valid, it is eſſential that it be delivered by the party himſelf, or his certain attorney. This is commonly expreſſed in the atteſtation, ſigned, ſealed, and delivered. A deed never takes effect till the delivery; therefore, if there be no date, or a falſe or impoſſible date, the delivery aſcertains the time, when it commenced its operation. The delivery of a deed may

tional,

[r] Statutes, 256. [ſ] Crary, &c. vs. Stoddard, S. C. 1794.

be abſolute, as when it is delivered to the party himſelf, or conditional, as when it is delivered to a third perſon, to be held till ſome condition be performed by the grantee, or the happening of ſome contingent event, and then to be delivered to the party. In which caſe, it is not delivered as a deed, but an eſcrow, a ſcrowl, or writing; which is never to take effect, till the conditions are performed, or the contingence happens.

13. [t] The ſtatute law requires, that all grants and deeds, made of houſes, and lands, ſhall be acknowledged before an aſſiſtant, commiſſioner, or juſtice of the peace. If a perſon after the execution of a deed, refuſes to acknowledge it, the grantee after requiring it, may enter caution with the recorder of the town, reſpecting the houſes or lands, granted or mortgaged to him, which ſhall ſecure the intereſt till a trial can be had: and then a copy of the judgment delivered to the regiſter, and by him recorded, ſhall eſtabliſh the title.

14. [u] A deed muſt be recorded. The ſtatute law enacts that no deed ſhall be accounted valid and compleated according to law, but ſuch as ſhall be written, ſubſcribed, witneſſed and acknowledged, and all ſuch grants ſhall be recorded according to law: that no grant or deed of bargain, ſale, or mortgage, made of any houſes or lands ſhall be accounted good or effectual in law, to hold againſt any other perſon or perſons whatever, but the grantor or grantors and their heirs only, unleſs the grant, deed or deeds thereof be recorded at length in the records of the town where ſuch houſes and lands lie: and the town-clerk or regiſter of every town in the ſtate, ſhall on the receipt of any deed or conveyance, or mortgage of any houſe, or land, brought to him, note thereupon, the day, month and year, when he received the ſame; and the record ſhall bear the ſame date.

The regulation adopted by this ſtatute, is founded in the higheſt wiſdom and policy, and has a moſt effectual operation to reduce the titles to things real to certainty, and leſſen the ſources of litigation. The records and files of the towns, will ſhew to every perſon, that is pleaſed to enquire, in whom is veſted the legal title to lands, and inform him whether he can purchaſe with ſafety. This renders all conveyances of lands a matter of much more public notoriety,

[t] Statutes, 250. [u] Ibid.

toriety, than the ancient method of livery of ſeiſin, or corporal inveſtiture; and as it makes that practice wholly unneceſſary, it is probably the reaſon of its diſuſe. However, theſe prudent regulations cannot wholly prevent fraud and difficulty. A man may execute a deed of land to one perſon, and receive payment, and before the deed is recorded, ſell the ſame land to another, and the laſt purchaſer procure his deed to be firſt recorded. To obviate this inconvenience, it has been determined, that every purchaſer of land ſhall have a reaſonable time to procure his deed to be recorded after the execution of it. But the length of time that is to be conſidered reaſonable, has never been aſcertained, and perhaps cannot be, and muſt be left according to the ſpecial circumſtances of each caſe. It has been adjudged where two deeds were taken on the ſame day, and the laſt deed was recorded the next day in the forenoon, and the other in the afternoon, that the firſt deed was recorded in reaſonable time, and ſhould hold the land. The propriety of this deciſion cannot be queſtioned: but then it has been determined, that where the perſon was not more than ſeven miles diſtant from the town-clerk's office, that more than two years was a reaſonable time. This deciſion goes in ſome meaſure to defeat the deſign of the ſtatute, and renders it impoſſible in ſome inſtances, to determine the owners of lands by the records of the town. A perſon having the title to lands apparent by the town records, may have ſold, and conveyed them a long time before, and the purchaſer has neglected to record his deed. Another perſon on diſcovering the record title to be in his favor, and being ignorant of the ſale, may purchaſe, pay his money, and record his deed. Then the other deed may be produced and recorded, and if a court ſhould think it to have been recorded in a reaſonable time, and they have judged two years to be a reaſonable time, the other conveyance is defeated. The ſtatute ought to have fixed a certain period, within which deeds ſhould be recorded, after their execution, ſo as to have avoided this difficulty: but as none is fixed by ſtatute, courts in aſcertaining a reaſonable time, ought to allow a perſon no more time than is neceſſary, by uſing due diligence to accompliſh the buſineſs; for the recording of deeds ought not to be delayed, as it is intended to furniſh public evidence of the title of lands: and if

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the time be extended beyond what is neceſſary to procure the deed to be recorded, an honeſt man, inſtead of deriving information from the records of towns, will be miſled by them, and defrauded of his property. But where the ſecond purchaſer has knowledge and notice of the firſt purchaſe, tho the deed be not recorded, if he procures his deed to be firſt recorded, yet he ought not to hold the land. For where the ſecond purchaſer had notice, he could not be deceived, and it was a fraudulent, diſhoneſt act to purchaſe, knowing the former ſale, and to take advantage of a bona fide purchaſer, becauſe he had neglected to record his deed. The world therefore muſt approbate the maxim, that notice of the firſt ſale to the ſecond purchaſer, ſhall defeat his purchaſe, tho he procure his deed to be firſt recorded. For the object of the law in requiring the recording, is only to give notice of conveyances, to ſecure ſubſequent purchaſers againſt prior ſecret conveyances and fraudulent incumbrances, and where a man has actual notice, it anſwers the ſame purpoſe, as if the deed was recorded; and if he will take the legal eſtate, after notice of a prior right, he is a purchaſer mala fide, tho he pays a valuable conſideration, and conforms to the requiſites of the law. He ought not therefore to hold againſt the bona fide purchaſer. But if a purchaſer for a valuable conſideration, ſhould not procure his deed to be recorded, within a reaſonable time, and another without notice ſhould purchaſe the land and procure his deed firſt to be recorded, he will be entitled to hold it both in law and equity; and no court, in a caſe ſo circumſtanced, ſhould give to the firſt purchaſer, any longer time within which, to record his deed, than what is neceſſary by the uſe of due diligence. So that the queſtion will commonly be, whether the ſubſequent purchaſer had notice of the prior conveyance. The ſame reaſon ought to apply in caſes of attaching lands, and levying executions thereon. If the attaching creditor, knows that the land has been previouſly conveyed by his debtor, for a bona fide conſideration, tho the deed is unrecorded: yet it is not juſt for him to attempt to take it from the purchaſer, to pay the debt of another, for if a man neglects to procure his deed to be recorded, for the purpoſe of ſcreening the eſtate from his creditors, yet it may be taken for his debts, and equity will compel a conveyance, ſo that the eſtate is liable for his debts, tho the deed is unrecorded.

Theſe

v These principles reſpecting notice, have been recognized by the courts of laws in England, in thoſe parts of the kingdom, where conveyances of lands have been required by law to be regiſtered.

Having conſidered the requiſites of deeds, we are next to conſider how they may be deſtroyed. If a deed want any of the material requiſites before enumerated, it is void, excepting however the requiſites of acknowledging and recording. The want of an acknowledgement may be ſupplied by the feoffee, and a deed unrecorded is good againſt the feoffor. But in this place it is our object to conſider, what acts may be done after the execution of the deed, by which it may be rendered of no effect.

1. w As to alterations. Anciently, if there were any razure, or interlineation in a deed, the court on inſpection, determined it to be void: but afterwards, this was left to the conſideration of the jury upon the proof, and if they found the razure or interlineation to have been done before the execution, the deed was adjudged valid. To a void uncertainty in this reſpect, it has been uſual where there was an interlineation, or razure in the deed, to make ſome memorandum at the time of the execution and atteſtation. But now whether any ſuch ſuch memorandum be made or not, a mere razure or interlineation, ſhall not of itſelf be preſumed, to be done after the execution of the deed, ſo as to vitiate it: but ſhall with the whole of the deed, depend upon the proof, for its validity, and be ſubmitted to the conſideration of the jury, to determine whether it be the individual contract, delivered by the parties.

If a deed be altered by a ſtranger in a point not material, without the conſent of the feoffor, it will not nullify the deed, becauſe it does not change the contract: but if it be ſo altered in a point material, it is vacated, becauſe it does not contain the actual contract of the parties.

But if a deed be altered by the party himſelf, tho in a point not material, it is rendered void. For when the party himſelf, makes any alteration in his own deed it diſcharges the contract: for the parties having agreed upon the preciſe form of words for their

v 2 Atk. 646. w Gilbert's law of Evidence, 106, 107.

their contract, if the party in whoſe favour it is, attempts to alter it, he makes a new contract in conſtruction of law, which diſcharges the firſt contract: and the new one being made with himſelf without the conſent of the other party, is abſolutely void, and ineffectual. But the principal reaſon of this rule is, to prevent people from making any alterations in their deeds for fear of vacating them. By the common law, the breaking off the ſeal vacates the deed.

2. Deeds may be rendered void by the diſagreement of thoſe parties whoſe concurrence is neceſſary. Thus in caſes of married women, by the diſagreement of the huſband, or her own, after ſhe becomes ſingle. So of infants, lunatics, and perſons under dureſs, after the diſabilities are removed.

3. Deeds may be declared void by the judgment of courts.—The power of courts of chancery to ſet aſide deeds, which were obtained by fraud, colluſion, or by ſome unjuſtifiable meaſures, belongs to a treatiſe upon equity. In this place, I ſhall only remark that all fraudulent conveyances to defeat creditors are void as to the creditors, but not the parties, and that creditors may take ſuch lands by execution, and in an action of diſſeiſin to recover the lands, the queſtion reſpecting the validity of the conveyance may be tried. And if the conveyance be found to be fraudulent, the court will conſider it to be void, and the creditor by force of his execution will hold the land ſo conveyed, in the ſame manner as if no conveyance had taken place. All conveyances, as gifts upon the conſideration of blood, natural love and affection, may be ſet aſide in favour of creditors, in the ſame manner. A conſideration muſt not only be valuable, but bona fide, for tho an actual payment be made, yet if done mala fide, and the intent is to defeat creditors, the deed is void.

It may be conſidered as a general principle, that a deed cannot be void with reſpect to a debt contracted ſubſequent to its execution: * but it has been determined where a perſon made a ſale of lands without conſideration, and continued in poſſeſſion, and appeared to be the owner, that ſuch deed was void, as it reſpected

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* Maſon vs. Rogers, S. C. 1791.

a debt contracted during ſuch poſſeſſion. In this caſe there was ground to preſume, that ſuch ſale was made with a view to enable the ſeller to contract debts, and avoid the payment; but where a ſale is made without conſideration, and the purchaſer goes into poſſeſſion, a ſubſequent creditor does not truſt the ſeller, on the credit of ſuch eſtate, and of courſe as to him, it cannot be a fraud.

y No perſon can take advantage of a fraud, to ſet aſide a conveyance, but he who is prejudiced by it, and has legal title. Therefore, where it appears that the defendant has no title, he can take no advantage of a fraud in the title of the plaintiff, for this was no prejudice to him.

We have conſidered the nature and requiſites of deeds in general, we proceed in the next place to a ſurvey of the ſeveral kinds of deeds, or modes of conveyance adopted by our laws.

1. A deed in the form I have already deſcribed, is the moſt univerſal and approved method of conveying eſtates in fee ſimple. This inſtrument of conveyance, is denoted by the word deed: and this word in common underſtanding is appropriated to ſignify that inſtrument only. For tho in legal conſideration, a deed comprehends every ſpecies of conveyances, as well as bonds and covenants under ſeal,—yet in common practice, we have appropriated this general term, to point out this particular inſtrument, inſtead of the particular term, which would be feoffment: and the other inſtruments of conveyance are diſtinguiſhed by their particular names, yet in our law proceedings, we conſider the word deed, according to its legal import.

Our deed is the ſame with the ancient feoffment uſed in England, varying only ſo as to exclude certain terms, which had immediate reference to the ſyſtem of feuds, and by way of diſtinction among lawyers, it is ſtill called a feoffment. The operative words uſually inſerted in deeds are, give, grant, bargain, ſell, alien, enfeoff, convey:—either of which would be ſufficient to transfer the eſtate. The ſellers are indiſcriminately called, donor, grantor, or feoffor, and the purchaſers, donee, grantee, or feoffee—By deed eſtates in fee-ſimple, fee-tail, and for life, which are created by

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y Barney vs. Cutler, S. C. 1793.

the act of the parties, are transferred. As we know of but few eſtates, excepting fee-ſimple, our conveyancing can boaſt of a ſimplicity, conciſeneſs, facility, and cheapneſs, ſuperior to any other country.

The original mode of conveyance in England was oral, and the evidence conſiſted in livery of ſeiſin, or corporal inveſtiture of the land in the preſence of the freeholders of the county. This was the general method in thoſe rude and ignorant ages, when the people were unacquainted with letters, or incapable of writing. But the uncertainty of ſuch conveyances, ſoon led them when they had acquired ſufficient knowledge to introduce conveyances in writing. They firſt adopted the ſimple and conciſe mode by feoffment: but for the purpoſe of rendering the tranſaction notorious and public, they accompanied it with livery of ſeiſin, or the corporal tradition of the poſſeſſion of the lands. Some inconvenience reſulting from the requiſite of delivery of poſſeſſion of the lands tranſferred, induced them to adopt various modes of conveyance to elude it: and leaſe and releaſe, are now the moſt common mode of conveyance in England, and in thoſe of the States in America, who have cloſely copied the Engliſh law. This mode of conveyance is ſo abſtruſe and intricate, that it requires much technical knowledge to be able to draw it, and is ſo voluminous, as to be attended with great expenſe. In a country where a free tranſfer of real property is admitted, it muſt be very inconvenient to have it encumbered with ſuch intricate and expenſive modes of tranſference. In this ſtate, we have reaſon to revere our anceſtors for the liberal ſpirit that led them to deviate from the laws of the country, from whence they emigrated and eſtabliſh a mode of conveyance, ſo plain that every proprietor of lands can eaſily acquire ſufficient knowledge to draw inſtruments to tranſfer them.

In this ſtate the law requiring the recording of deeds, ſuperſeded the neceſſity of an actual delivery of poſſeſſion of the premiſes. For as this is a much more effectual mode to render the tranſaction known and public, it would be ſuperfluous to continue the common law practice of delivery of poſſeſſion. It is unqueſtionably, upon this principle that that practice has been generally

diſcarded, tho it is true there are ſome inſtances, where we ſee perſons go through with the ceremony of delivery of poſſeſſion by turf and twig, in compliance with the tradition of its neceſſity.

All that is required by our law, to transfer the eſtate is, that one party be either in poſſeſſion himſelf, or by ſome perſon under him: but if a ſtranger be in poſſeſſion claiming right, or holding by an adverſary title, then the deed is void.

2 A leaſe is a conveyance of the uſe of lands for life, for years, or at will; but muſt be for a leſs time than the leſſor has in the premiſes, for if it be of the whole intereſt, it is an aſſignment. It is by deed only, that the fee of land paſſes, and by leaſe, nothing paſſes only, the uſe. The operative words in a leaſe are, *demiſe, grant, and to farm let.* Leaſes are made either in conſideration of money paid, or rent reſerved in the leaſe. It is the moſt common practice, to take leaſes of lands upon the contract to pay a certain ſum, which is paid in hand, or ſecured by an obligation diſtinct from the leaſe, in which caſe, the leſſee purchaſes a certain term in the lands: but ſometimes leaſes are made in conſideration of certain rent reſerved in the leaſe: to which conditions may be annexed, as a forfeiture of the leaſe, and right of re-entry in the leſſor, when the rent is in arrear.

If a perſon has power, by virtue of a letter of attorney, to make leaſes for years, generally, he muſt do it in the name and ſtile of his maſter, and not in his own name. He muſt ſubſcribe the name of the principal, and deliver the leaſe as his act. For if he ſigns his own name, and adds by virtue of the letter of attorney, this will not help it, becauſe, by the letter of attorney he acquired no intereſt, but only the power of acting for the principal.

Leaſes muſt be recorded by force of ſtatute, which enacts, [a] "that "no leaſe hereafter made, of any houſes or lands within this ſtate, "for life or any term of time exceeding one year, ſhall from and "after the firſt day of September next, be accounted good and ef- "fectual in law, to hold ſuch houſes or lands againſt any other per- "ſon or perſons whatſoever, but the leſſor or leſſors, and their "heirs only; unleſs ſuch leaſe be in writing, and ſubſcribed by the

[a] Statutes 576.

" the leſſor, and atteſted by two ſubſcribing witneſſes, and ac-
" knowledged before an aſſiſtant or juſtice of the peace, and be
" recorded at length, in the records of the town where ſuch houſes
" and lands are.

" That no leaſes of houſes and lands already made for term of
" life, or any term of time, exceeding one year from the time of
" riſing this aſſembly, ſhall be good and effectual in law, againſt
" any other perſon or perſons, but the leſſor, or leſſors, and their
" heirs; unleſs the ſame be recorded in the records of the town
" where ſuch eſtate lies, on or before the firſt day of September
" next."

z It has been adjudged, that writing, giving liberty or licence to flow lands, for the purpoſe of a mill, is within the law, and muſt be recorded, or it is void againſt creditors and purchaſers.

Tho a parole leaſe, is null by the ſtatute of frauds and perjuries, yet it may operate in ſome inſtances, as a licence. If a perſon by virtue of a parole leaſe, enter into the poſſeſſion and improvement of lands, he cannot be ſued as a treſpaſſer, for the parole leaſe will amount to a licence to enter. If he plants or ſows, he will be entitled to the emblements. He cannot be ſued on a contract to pay rent, but where he takes the profits of the land, indebitatus aſſumpſit will lie to recover the value.

3. An *exchange* is defined to be a mutual grant of equal intereſts, the one in conſideration of the other. The eſtates muſt be equal in quantity of intereſt, as fee ſimple for fee ſimple, but may differ in valor. The word exchange, is by law appropriated to this caſe, and can be ſupplied by no other. This mode is not practiſed in this ſtate, but the cuſtom is, for each party to execute deeds in common form.

4. A partition is where two or more joint-tenants, co-parceners, or tenants in common, agree to divide the lands, each taking his part and portion. They mutually convey, and aſſure to each other, the ſeveral eſtates they are to hold ſeparately.

z Smith vs. Simons, S. C. 1791.

Thefe are denominated primary, or original conveyances; the following are called fecondary, or derivative conveyances.

5. Releafes, which are a difcharge, or conveyance of a man's right in lands to another, that hath fome former eftate in poffeffion. The words generally ufed are, "*remife, releafe, and forever quit-claim.*" Releafes enure to enlarge an eftate, as where the remainder man releafes his right to the tenant for life, or the reverfioner to the tenant for years: to pafs a right, as where one co-parcener releafes to another: to pafs an eftate, as where the diffeifor releafes to the diffeifee; or where a perfon diffeifed by two, releafes to one of the joint diffeifors, the diffeifor to whom the releafe is given, fhall hold the lands, to the excluſion of the other.

We have in this ftate a common mode of conveyance, called a quit-claim deed. Tho it be in the form of a releafe, yet the object is to transfer lands without warranty expreſs or implied. It is therefore a common practice for a proprietor of lands to execute a quit-claim deed to a purchafer, who has neither poſſeſſion or pretence of claim: and as by our law, a deed is conſidered in all cafes, as giving poſſeſſion, this operates as a conveyance without warranty.

6. A confirmation is nearly allied to a releafe, and is defined to be a conveyance of an eftate, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is encreaſed, and the words of making it are, have given, granted, ratified, approved, and confirmed.

7. An aſſignment is properly the transfer of all the right a perſon has in any eſtate, but is uſually applied to eſtates for life, or years. It differs from a leaſe in this, a leaſe only grants part of the intereſt, reſerving a reverſion, but an aſſignment diſpoſes of the whole eſtate.

8. A defeaſance, is a collateral deed, made at the ſame time, with the other conveyance, containing certain conditions, upon the performance of which, the eſtate then created, may be totally undone. Originally mortgages were uſually made in this manner, the mortgagor conveying to the mortgagee, and he at the ſame time executing a deed of defeaſance, whereby the deed to him

was rendered void on the repayment of the money borrowed at a certain day. But the practice is now to annex the condition to the mortgaged deed, and ſo indeed of all other conveyances intended to be conditional, which has rendered defeaſances as ſeperate deeds, unneceſſary.

Before I cloſe this chapter, it is neceſſary for me to give a ſlight ſketch of the law, reſpecting uſes and truſts. On this ſubject however, I ſhall be extremely conciſe, as our law concerning lands, render unneceſſary ſuch modes of conveyance, and it is inconſiſtent with the nature of this elementary treatiſe, to go into a minute conſideration of all the ſubtleties and refinements, which have been introduced into that branch of law, by the Engliſh juriſts.

[a] Uſes originated, it is agreed, from a principle in the Roman law, which admitted a uſufructuary property in a thing, diſtinct from a thing itſelf, that one perſon might own lands, and another be entitled to the uſe. This principle was tranſported into the Engliſh law by the clergy, for the purpoſe of eluding the ſtatutes of mortmain, which prohibited them from holding lands. As the chancellors were generally clergymen, they countenanced, ſupported, and eſtabliſhed this doctrine. A uſe, may be defined to be a gift of lands to one perſon, for the uſe of another, who in law language is called *ceſtui que uſe*. Feoffor, enfeoffs a perſon of lands to the uſe of himſelf, or ſome other perſon. The feoffee has the legal property and poſſeſſion of the lands, while the ceſtui que uſe had a right to enjoy the profits. But ceſtui que uſe, was conſidered as having no right to, or in the thing itſelf. The abſolute property was in the truſtee, and the ceſtui que uſe confided in the conſcience of the truſtee, for the profits of the land. The chancellor whoſe peculiar juriſdiction extended to matters of conſcience, would compel the feoffee in truſt, to perform the truſt repoſed in him. When the clergy had introduced this artificial principle of juriſprudence, it was adopted by civilians to avoid the reſtraint, and hardſhips of the feudal ſyſtem, upon the proprietors of lands, which they then began to feel to be very burdenſome and oppreſſive. During the long civil wars between the houſes of York and Lancaſter

[a] 2 Black. Com. 327, Bacon. Title Uſes and Truſts. 3 Reeve Hiſt. Engliſh law, 364. [1] Ibid. 126, 139, 214, 340.

Lancaſter, this became a common mode of conveyance, for the purpoſe of ſecuring eſtates againſt forfeitures. When uſes had become general, a refined ſyſtem of rules reſpecting them was adopted. In chancery it was ſaid, every man ſhall have his remedy according to the intent of the feoffment, and according to conſcience, but in the courts of law it is otherwiſe; for the feoffee ſhall have the land, and the feoffor ſhall have nothing againſt his own feoffment, tho it was upon confidence. The chancery of courſe aſſumed excluſive juriſdiction reſpecting uſes.

The regulations reſpecting uſes, that rendered them ſubſervient to the views, the wiſhes and the intereſt of the people were:

1. That uſes could not be forfeited to the king for treaſon, by which the eſtate might be ſecured to the heir, againſt that barbarous law of forfeiture, which puniſhes the children for the crime of the parents. 2. That uſes ſhould not be liable to any of the feudal burdens, as eſcheat for felony, or defect of blood, or wards, marriages, reliefs, heriots, and aids to knight the eldeſt ſon, or marry the daughter. 3. That uſes ſhould not be extendible for debts, on any legal proceſs, by which the ceſtui que uſe was enabled to cheat his creditors. 4. That uſes were deviſeable, by which ceſtui que uſe might make ſuitable and convenient proviſions and ſettlements for his family, which was deemed a great privilege at the time of the feudal reſtraints upon deviſes. 5. That uſes might be aſſigned by ſecret deeds between the parties, by which the proprietor of the lands might be kept unknown, and the parties avoided the trouble and inconvenience of livery of ſeiſin, or delivery of poſſeſſion of the land, as required at common law. 6. That huſband ſhould not have curteſy of a uſe, nor the wife be endowed, which gave birth to the doctrine of jointures.

At the ſame time courts of chancery determined, that uſes could not be raiſed without ſufficient conſideration, and that they were deſcendable according to law. It is eaſy to ſee the inconveniences that muſt neceſſarily reſult from this metaphyſical ſpecies of eſtate, while conveyances could be made in a ſecret manner, and the land and the uſe were two independent ſubjects, and might reſide in different perſons. Sundry ſalutary regulations were made to

avoid

avoid this inconvenience without effect, till the famous ſtatute of uſes paſſed in the 27th year of Henry, VIII. which was calculated to cut up uſes by the roots. This ſtatute recites the frauds ariſing from ſecret conveyances, without livery of ſeiſin, and from wills ſometimes in writing, and ſometimes by naked words, or tokens by perſons, viſited by ſickneſs, in their extreme agonies and pains, by deſigning perſons, to the diſinheriting of heirs; the injuſtice that aroſe in depriving lords of their feudal rights, and the crown of the benefits of forfeitures; the perjuries in the trials of the ſecret wills and uſes, and the uncertainty reſpecting the property of the lands; and then enacts, that when any perſon ſhall be ſeiſed of any lands or other hereditaments, to the uſe, confidence or truſt of any other perſon, or body politic, the perſon or corporation, entitled to the uſe in fee-ſimple, fee-tail, for life, or for years, or otherwiſe, ſhall thenceforth ſtand and be ſeiſed or poſſeſſed of the land of, and in the like eſtate, as they have in the uſe, truſt, or confidence, and that the eſtate of the perſon ſo ſeiſed to the uſe, ſhall be deemed in them, that have the uſe in ſuch manner, quality, form, and condition, as they had before in the uſe. Thus the ſtatute executes the uſe as it is termed, that is, transfers the uſe into poſſeſſion; by which means the ceſtui que uſe become compleatly poſſeſſed of the land in law, as he was before in equity. [b] No words ſays Reeve in his hiſtory of the Engliſh law, could be imagined more ſimple, and at the ſame time more efficacious for the annihilation of uſes, than the purview of this act. By a kind of legal magic, the whole frame of landed property ſeemed on a ſudden to be changed, and every man who had before, only the uſe of his eſtate, at the mercy almoſt of his feoffees, was made in an inſtant, the compleat and lawful owner of it.

The courts of law inſtead of ſending ſuitors to the courts of chancery for relief, began to take coguizance of uſes as legal eſtates: and the learning of landed property would have been ſettled again upon the principles of common law, had it not been for the narrow, technical, and illiberal notions of the judges. They determined that no uſe could be limited on a uſe, and that when

[b] 4 Reeve's hiſt. Eng. law, 245.

when a man bargains, and ſells his lands to another for money, which raiſes a uſe by implication to the bargainee, the limitation of a further uſe to another perſon is repugnant, that the ſtatute did not extend to terms of years, or other chattel intereſts, becauſe the expreſſion was only ſeiſed, and the termor is not ſeiſed but poſſeſſed, and that where lands are given to one, and his heirs, in truſt to receive the profits, and pay over to another, this uſe is not executed by the ſtatute: for the land muſt remain in the truſtee to enable him to perform his truſt.

Theſe deciſions of the courts of law rendered neceſſary a recurrence to the chancellors, who took cognizance of ſuch caſes, and in a ſhort time revived under the denomination of truſts, their juriſdiction of uſes, for it was eaſy to vary the form of words, by which the conveyance was expreſſed, ſo that according to the deciſion of the courts of law, the ſtatute of uſes would not execute the uſe, or transfer the uſes into poſſeſſion; and then the courts of chancery would take cognizance of them as truſts.

So that the whole effect of the Statute of Henry, VIII. on uſes, was to render it neceſſary for the chancery to elude it, to change the name of uſes into truſts. This ſtatute however gave efficacy to certain new modes of conveyance, calculated to render theſe tranſactions ſecret and ſave the trouble of livery of ſeiſin. Such as a covenant to ſtand ſeiſed to uſes, and leaſe and releaſe, which are the common modes of conveyance in England.

But when the courts of chancery reſumed their juriſdiction over uſes under the name of truſts, they adopted rules which were calculated to avoid the inconveniences that were derived from uſes. They conſidered a truſt eſtate to be equivalent to a legal ownerſhip, governed by the ſame rules of property, and liable to every change in equity which the other is in law.—The ceſtui que uſe, has no right in, or to the thing in law, but in equity he has. The truſtee is conſidered as the mere inſtrument of conveyance, and cannot effect the eſtate. Yet in conſideration of law he is the proprietor of the eſtate, but not in equity. The truſt will deſcend, may be aliened, is liable to debts, to forfeiture, to leaſes,

and

and other encumberances, and to the curteſy of the huſband as if it were an eſtate at law. The truſtees may be compelled in chancery to make conveyances to the ceſtui que truſt, or ſuch other perſons as equity may require. Such is the law of England, reſpecting uſes and truſts.

But as in this ſtate, none of the reaſons exiſt that did in England, for their introduction, and as no advantages can be derived from them it is not probable that they will ever be adopted. The recording of our deeds, precludes the poſſibility of a ſecret mode of conveying eſtates, by which the legal eſtate can be concealed, or rendered uncertain, and a proviſion for prodigal children may as well be made by giving them the uſe of the eſtate during life, or to another in truſt for him—as in both inſtances, the eſtate will be equally at his controul and equally liable for his debts. The truth is, our general law has given the proprietors of land, every honeſt privilege that can be derived from uſes, and truſts, that is, exemption from forfeiture and the feudal incidents, and the power of deviſing, and has deprived them of every unjuſt privilege, that was acquired by the ceſtui que truſt, that is, exemption from liability to be taken for debts, and the power of ſecret conveyances, tho there be no neceſſity of a formal public delivery of poſſeſſion.

If the deciſion of the ſuperior court in the only caſe which has come before them, be conſidered as law, the buſineſs of uſes and truſts, is at an end. They have adjudged that the ceſtui que uſe, ſhall take the eſtate in the ſame manner, as tho it had been directly granted to him; and that the feoffee, or truſtee has no property in the eſtate, even at law. As this is the only caſe that has been adjudged on this point, it is neceſſary to conſider it at large. [c] The caſe was, Nathaniel Cornwell in conſideration of love and good will to Abigail Taylor, his neice, and wife of Joſeph Taylor, granted to Jeremiah Bacon, his heirs and aſſigns, the lands in queſtion, to hold in truſt for the ſaid Abigail during life, and then for her children, born, or to be born, and to their heirs and aſſigns forever. Abigal died leaving four children, and Joſeph Taylor as their guardian was in poſſeſſion of the lands, and action

c Kirb. 368.

of diſſeiſin was brought againſt him, by ſaid Jeremiah, to recover the poſſeſſion ; the court determined, that the children of Abigail had an abſolute eſtate in the lands in queſtion, and that the poſſeſſion follows the uſe, that ſaid Jeremiah being only a mere nominal perſon in the deed, and no conſideration ariſing from him, he is conſidered as having no legal eſtate in the premiſes, by which to recover poſſeſſion. Their opinion is grounded upon the principle that the doctrine reſpecting uſes eſtabliſhed by the ſtatute of uſes in England, was in the idea of our anceſtors, at the time of their emigration, the law, and that to eſtabliſh a doctrine of uſes here, which would neceſſarily acquire a number of ſtatutes to remedy the inconvenience, reſulting from it, would neither be wiſe or prudent.

By this deciſion, it is eſtabliſhed that ceſtui que uſe, will take abſolutely as large an eſtate, as the uſe or truſt given to him. If the uſe be to him, and his heirs, then he takes an abſolute eſtate in fee-ſimple ; if for life, or years, then an abſolute eſtate for life or years, while the feoffee or truſtee takes not even the ſhadow of a legal eſtate. This extends the ſtatute of uſes to truſts, as well as uſes, and annihilates all ſuch eſtates at a ſingle ſtroke. This was not however a unanimous deciſion of the court, and the reaſoning of the minority demonſtrate that the judgment of the majority was againſt the then exiſting law.

The courts of common law in England, always recogniſed the principle, that feoffee or truſtee had an abſolute eſtate at law in the lands, and that the ceſtui que uſe had nothing but an equitable right, which courts of chancery only could make effectual. The power of a proprietor of lands at common law, to make ſuch conveyances has never been queſtioned, and certainly, this power exiſts in the very nature of the title. I may give the uſe and improvement of my eſtate to one for years, and then to another in fee. Here the tenant for years, has nothing but the right to uſe, while the fee is in another perſon. By the ſame principle I may give my eſtate abſolutely to one, to hold in truſt for the uſe of another. In both caſes, the uſe and the fee are in different perſons.

The

The ſtatute of uſes, has no more force in this ſtate than the ſtatute of Weſtminſter the ſecond, and our courts may as well make ſtatutes at home, as import them from abroad. Here was a right exiſting at common law, to create a certain ſpecies of eſtate and which never had been taken away by ſtatute. No judicial tribunal can take away the right, without exerciſing legiſlative powers. To have been conſiſtent, the court ſhould have ſaid, that a perſon had no right to make ſuch eſtate, that nothing was paſſed by the conveyance, and the property was in the original grantor, but to deny him the right of making ſuch an eſtate, and then veſting the property different from what he intended, is an aſſumption of power, on the part of the court, to make a diſpoſition of a man's eſtate, not only without his conſent, but againſt his will: for they might as well have directed this land to have veſted in any other mode, as conformable to the Engliſh ſtatute of uſes.

That our progenitors conſidered the doctrine of uſes, as ſettled by the ſtatute of Henry VIII. to be law, at the time of their emigration, is at leaſt problematical: for at that time, which was in the reigns of James I. and Charles I. it is a well known fact, that uſes had been reſtored under the name of truſts; and were then recognized by the courts of law, and effectuated by the courts of chancery. Our anceſtors therefore, if they knew any thing of this ſubject muſt have had an idea, that truſt eſtates were conſiſtent with the law of England. But at any rate, it is a very far-fetched argument, indeed to ſay, that the idea of our anceſtors reſpecting the operation of a ſtatute in England, at the time of their emigration, ſhall be the rule to decide what the common law is, upon a caſe ariſing, one hundred and fifty years afterwards.

Conſidering our general regulations reſpecting landed property, there can be no reaſon for apprehending that any inconvenience as the court have ſuggeſted, tho they have pointed out none, could reſult from adopting the doctrine of uſes. It therefore would have been better, and much more conſiſtent with law, if Taylor had applied to a court of chancery, and obtained a decree, which unqueſtionably would have been in the power of the court, that Bacon ſhould have releaſed his right at law, to the children of Abigail,

for whoſe uſe he held it. This would have been no violation of the common law. A uſe or truſt would then have been deſcendable, deviſeable, transferable, and liable for debts, like an eſtate at law, and the truſtee under the power of courts of equity, and compellable to make ſuch conveyance, as juſtice required. Whether our courts in future, will conſider this deciſion to be law, it is not probable will ever be determined; as there is but little proſpect that another ſuch caſe will ever come before them.

Chapter Seventeenth.

OF TITLE BY DEVISE.

A Deviſe is a diſpoſition of real eſtate in a man's laſt will and teſtament. The power of deviſing has been generally permitted by all laws but thoſe of feudal origin. In England, lands were deviſeable before the conqueſt, but the introduction of the feudal tenures, deprived the ſubjects of that right, until it was reſtored by ſtatute in the reign of Henry VIII. At the time when our forefathers came from England, the power of deviſing, was poſſeſſed by the people, and they eſtabliſhed it here in the fulleſt extent. Our ſtatute law declares, [d] that all perſons of the age of twenty-one years, of right underſtanding and memory, whether excommunicated, or other, (not otherwiſe legally incapable,) ſhall have full power, authority, and liberty to make their wills, and teſtaments, and all other lawful alienations of their lands and other eſtates, [e] and that no wills or teſtaments, wherein there ſhall be any deviſe or deviſes of real eſtate, ſhall be held good and allowed for any ſuch deviſe or deviſes, if they are not witneſſed by three witneſſes, all of them ſigning in the preſence of the teſtator.

In this place, it is not my intention to enter into a general conſideration of wills, which will be reſerved till I come to treat of perſonal property. I ſhall ſay nothing more concerning them than what is neceſſary to explain the law reſpecting deviſes.

All

d Statutes, 3. It is ſingular, that the word "excommunicate," ſhould have been introduced into the ſtatute, or continued in the reviſions, when it is well known that there never was an eccleſiaſtical tribunal in this ſtate that could denounce a ſentence of excommunication, or any other decree, that could effect a man's civil rights. *e* Statutes 125.

f All perſons are capable of deviſing their eſtates, unleſs they are under certain diſabilities or diſqualifications. Theſe are founded upon a want of diſcretion, or a want of capacity. *g* Infancy, diſables a perſon to deviſe his eſtate, for want of proper diſcretion. *h* So idiocy and inſanity, diſqualifiy, for want of capacity. *i* Non-ſane memory is a diſqualification, founded on incapacity. It is not ſufficient, that the teſtator be of ſufficient memory, when he makes his will, to anſwer familiar and uſual queſtions, but he ought to have a diſpoſing memory, ſo that he can make a diſpoſition of his eſtate, with underſtanding and reaſon; which the law calls a ſane and perfect memory. Reſtraint, menace, or dureſs of impriſonment, is a diſqualification at common law, for the ſtatute law expreſsly deſignates the other diſqualifications, and then ſays generally, *not otherwiſe legally incapable*, which muſt refer to a common law incapacity. Thus if a man in his ſickneſs, makes a will, by the over importuning of his wife, to the end that he may be quiet, this ſhall be ſaid to be a will by reſtraint, and not binding. But there muſt be actual proof of ſome undue importunement or reſtraint of the deviſor, to avoid a will regularly made. *k* If a perſon be under any of theſe diſabilities, viz. infancy, idiocy, inſanity, non-ſane memory, or dureſs, at the time of the inception of the deviſe, it will be abſolutely void, tho the diſability be actually removed before the conſummation thereof, by the death of the deviſor, for a deviſe or will is ſuch from the making, and therefore the parties muſt be qualified, and have ability at that time: and if the perſon, after the removal of the diſability declares that the will made during the diſability ſhall ſtand, it is ſtill void. A married woman in England is by ſtatute diſqualified to make a deviſe.—Our ſtatute does not name a married woman, but generally, not otherwiſe legally incapable. So that a queſtion has ariſen lately, whether a married woman at common law, be diſabled to deviſe her eſtate. In the caſe of Adams and Kellogg, where a married woman deviſed her lands to her huſband, the ſuperior court adjudged that the deviſe was void, becauſe the deviſor at common law was diſabled to make it. This decision was afterwards reverſed by the ſupreme court of errors, by which, the law is now ſettled, that a married woman may make a deviſe of her own lands, even to her huſband.

The

f Pow. on deviſes, 138. *g* Ibid. 143. *h* Ibid. 144. *i* Ibid. 145. *k* Ibid. 173.

The ſtatute law has preſcribed no particular form for a deviſe; of courſe any words that ſufficiently expreſs the intent, will be a good deviſe. Neither has the ſtatute made it requiſite by expreſs words, that the will be in writing, or be ſubſcribed by the teſtator. *l* But it requires that a will ſhall be witneſſed by three witneſſes, who ſhall ſign in the preſence of the teſtator, if it contain a deviſe of lands, to make the deviſe good. This clearly implies, that the will muſt be in writing: but points out no regulation reſpecting the ſigning of the teſtator, for tho we ſhould ſuppoſe that the witneſſing of the witneſſes, muſt be to his ſigning, yet their witneſſing to his publication would comply with the words of the ſtatute. But it is underſtood, that all wills containing deviſes of lands, muſt be in writing, ſigned by the teſtator, whether at the beginning or end of the will is immaterial; ſealed as is commonly practiſed, tho not abſolutely neceſſary, and witneſſed by three witneſſes, all ſubſcribing their names in the preſence of the teſtator, ſo that he may have it in his power not only to ſee them, but he muſt actually obſerve them. The witneſſes muſt be legal, in point of character, for infamous perſons, who have committed, and been convicted of the crimes which at common law diſqualify perſons to teſtify, cannot be witneſſes to wills, and in point of intereſt, for a perſon who has any intereſt in the eſtabliſhment of a will, as a legatee or deviſee cannot be a witneſs. But it has been adjudged by the courts of law in England, in the caſes of Wyndham, vs. Chetwynd, and Kindſon vs. Keney, that a witneſs incompetent at the time of atteſtation, might purge himſelf afterwards either by releaſe or payment, and become competent by the rule of the law.

All natural perſons are capable of being deviſees: as well as corporations, or bodies politic. But theſe laſt from their nature cannot make a deviſe. *m* Deviſees may be aſcertained by nomination, an actual naming of the perſons, or by deſcription, ſo that the perſon intended can be known. Deſcription, may be by the name of dignity, or office, or by the name of reputation, or neareſt of kin and the like. If the name or deſcription be miſtaken, yet if the perſon intended to take, be certain, the deviſe is good. Aliens cannot be deviſees.

Every

l Statutes, 115. *m* Powel on deviſes, 337.

Every perſon may deviſe any eſtate that he has in things real, and may create by deviſe, any kind of eſtate, excepting thoſe which ariſe from the mere operation of law: and may impower executors to ſell lands.

n A deviſe is deemed to be a conveyance, and therefore will transfer only ſuch lands as the deviſor owned at the time of making deviſe. Therefore if a man deviſes lands by particular deſcription, and afterwards purchaſes them, or if he deviſes all the lands of which he ſhall die the owner, and afterwards purchaſes, the deviſe in both theſe caſes is void, as it reſpects the ſubſequent purchaſes.

o A deviſe by a man to his heirs, to take in the ſame manner they would have done by deſcent, is void, and the heirs ſhall take by deſcent.

p A deviſe was made to a perſon, and his male heir in fee-tail, in ſucceſſion forever; the deviſee died leaving two ſons; it was determined that the word heir is nomen collectivum, and ſignifies him or them who by law ſucceed to, and inherit the eſtate of another, and that it included both the ſons, who ſhould inherit as heirs at law.

q A deviſe may be void for uncertainty, and repugnancy: for it is a general rule in the conſtruction of wills, that whenever there is an irreconcileable uncertainty or repugnancy in the diſpoſition, made by the teſtator of his real property, the title of the heir at law ſhall be prefered to all others: becauſe where the court cannot aſcertain beyond a doubt, the meaning of the teſtator, they muſt recur to the rules of deſcent, where there is no doubt. Uncertainty, and repugnancy may reſpect the thing deviſed, the quantity of intereſt meant to be deviſed, and the perſon intended to be the deviſor. *r* A deviſe may fail of taking effect by the waiver, or refuſal of the deviſee. *ſ* The deviſor after the inception, and before the conſummation of a deviſe, may revoke by a diſpoſition of the eſtate deviſed, or by a ſubſequent different deviſe, by a new will, or by codicil, or by a ſubſequent marriage, and having children, which is a preſumptive revocation, that may be reberted by proof, or by any alteration in the nature of the eſtate, by the act of the party, by a ſtranger, or by the act of the law.

It

n Powell. Dev. *o* Ibid 431. *p* Larrabe vs. Larrabe, Sup C. 1793.
q Powl. Dev. 411. *r* Ibid. 442. *ſ* Ibid. 532.

[t] It is a general rule of law, that no parol declarations of the teſtator, may be offered in evidence to controul, or alter the written diſpoſition of his eſtate, contained in his will, and that parol declarations ſhall not be admitted to explain, enlarge, controul, or reſcind the language uſed therein, for the conſtruction thereof is the proper buſineſs of the judge, and is reſtrained to ariſe out of the inſtrument alone. No proof can be admitted that the teſtator intended to create a different eſtate from what is expreſſed. If a man deviſe land to his wife, for the term of her life generally, no parol proof can be admitted, that he intended it by way of jointure, and in ſatisfaction of dower, becauſe the whole of the will concerning lands ought to be in writing, and no averment ought to be taken out of the will, which could not be collected from the words contained in the will.

[u] The law will admit the averment of the party, as to matters of fact, reſpecting wills, where the matter averred is conſiſtent, and ſtands with the words of the will. Thus if a man has two ſons, both called by the name of John, and ſuppoſing that the elder who had been long abſent is dead, deviſed his lands to his ſon John generally, when the elder in fact is living; here the younger may alledge that the deviſe is to him, and may produce witneſſes to ſhew his father's intent, that he thought the other to be dead, or that he at the time of making the will named his ſon John the younger, and the writer left out the addition of younger; for this averment is conſiſtent with the words of the will. So parol proof may be admitted to ſhew whether the inſtrument was meant as a will, or a deed. So if there be father and ſon, both called by the ſame name, and there be a deviſe to a perſon of that name, without diſtinguiſhing which, parol evidence may be admitted to prove that the deviſor did not know the father, upon which the eſtate ſhall go to the ſon. If words of an equivocal ſenſe be uſed, a parol averment may be admitted to direct the application. As where a deviſe was to a ſon by name, and his chriſtian name was miſtaken, but it was added in the ſervice of the duke of Savoy, parol evidence was admitted to aſcertain this ſon, and tho his name was miſtaken he had the eſtate. But if the perſon be not in ſome manner

[t] Paw. Dev. 477. [u] Ibid. 482.

manner deſcribed in the deviſe, no averment will be admitted to ſhew who was intended, becauſe in ſuch caſe the ambiguity appears on the face of the inſtrument. No averment will be admitted to ſupply any thing, that is not written. If there be a blank in the will, no evidence can be admitted to prove how the teſtator intended it ſhould be filled.

* Parole declarations of the teſtator, are likewiſe received in all caſes to rebut the conſtructive declarations of a truſt, put upon words contrary to the legal ſenſe of them, which is rebutting an equity, for in ſuch caſes the eſtate is in the deviſee, and the averment is in ſupport of the letter of the will. So parole evidence may be admitted in all caſes, to counteract fraud, becauſe to decide otherwiſe, would be to make the rule inſtrumental in encouraging that, which it is its object to prevent.

Having finiſhed my remarks on deeds and deviſes, I proceed to a conſideration of ſome general rules reſpecting their conſtruction.

1. * That the conſtruction be favorable, and as near the mind, and apparent intent of the parties, as the rules of the law will admit. For the maxims of law are, that the words ought to be ſubſervient to the intention, and that writings be favorably interpreted on account of the ſimplicity of mankind. The conſtruction therefore muſt be reaſonable, and agreeable to common underſtanding.

2. That where there is no ambiguity in words, no expoſition ſhall be made contrary to the words: but where the intention is clear, too ſtrict a ſtreſs ſhall not be laid upon the preciſe ſignification of the words; for he who ſticks in the letter, ſticks in the bark. Therefore by the grant of a remainder a reverſion may paſs, and ſo the reverſe. Another maxim is, that bad grammar does not vitiate a writing; neither falſe Engliſh, nor bad latin, will deſtroy a deed.

3. That the conſtruction ſhall be made upon the whole deed, and not upon the ſeparate parts; that every part be made, if poſſible, to take effect: and that every word be made to operate in ſome ſhape or other.

4. That every deed ſhall be taken the moſt ſtrongly againſt him who is the agent, or contractor, and in favor of the other party.

* Powel Dev. 524. * 2 Black. 379.

5. That if the words will bear two ſenſes, one agreeable to, and another againſt law, that ſenſe ſhall be prefered which is moſt agreeable to law. As if proprietor in fee-tail, lets a leaſe for life generally, it ſhall be conſtrued for his own life only, for that is conſiſtent with the law: and not for the life of the leſſee, which is beyond his power to grant.

6. That in a deed, if there be two clauſes ſo totally repugnant to each other, that they cannot ſtand together, the firſt ſhall be received, and the latter rejected; but in a will, where there are repugnant clauſes, the laſt ſhall ſtand: on the principle that the firſt deed, and laſt will, are always moſt available in law.

7. That a deviſe be moſt favorable expounded, to purſue if poſſible, the will of the deviſor, who for want of advice, or learning, may have omitted the legal and proper phraſes. The law therefore many times diſpenſes with the want of words in deviſes, that are abſolutely eſſential in all other inſtruments. Thus a fee-ſimple may be created by deviſe, without the word heirs, and a fee-tail without uſing words of procreation, if it be apparent that ſuch eſtate was intended to be created, *y* as a deviſe to a man, and his ſeed, or his heirs male, or any ſuch expreſſions, evincive of his intent, tho in a deed an eſtate for life only would paſs. The ſame may be ſaid in reſpect of eſtates in remainder and reverſion.

Chapter Eighteenth.

OF TITLE BY ESCHEAT.

LANDS never eſcheat by reaſon of tenure, and of courſe there are no private perſons who take lands on failure of heirs, as was done by the feudal lords, on extinction of inheritable blood in their vaſſals. Lands eſcheat to the ſtate, on failure of heirs, according to the rules of deſcent, or when no owner can be found. *z* The ſtatute reſpecting eſcheats, points out the mode of procedure. The courts of probate are to ſecure ſuch eſtates in the hands of adminiſtrators, by them appointed for that purpoſe, and to notify the ſtate treaſurer, who has power to diſpoſe of the ſame, and to render his account to the general aſſembly annually. If any

y 2 Black. Com. 115. *z* Statutes, 51.

any heir or owner ſhould afterwards appear, they are entitled to the eſtate, or a reaſonable compenſation.

Lands eſcheat upon failure of heirs, and this happens where there is a compleat extinction of inheritable blood, according to the law of deſcent.

An heir to a perſon, is he who on the death of ſuch perſon, will by the law of deſcent ſucceed to his eſtate. This implies, that no perſon can be a compleat heir of another, till the anceſtor be dead, for it is a common maxim, that no one is the heir of the living. Before the death of the anceſtor, thoſe perſons who are entitled to ſucceed to his eſtate, if he dies inteſtate, may be denominated heirs apparent, or preſumptive heirs. All perſons may be heirs, excepting monſters, baſtards, and aliens.

1. *a* A monſter, is defined to be a creature born in lawful marriage, that has not the ſhape of mankind, and evidently has ſome reſemblance of the brute creation. Creatures coming within this deſcription cannot inherit. But then the deformity muſt be ſo great, that the being cannot be conſidered, as a part of the human ſpecies: for if the being, be created in human form, tho he be deformed in ſome parts of his body, as if there be ſix or four fingers, or the limbs are uſeleſs, or diſtorted, yet he may be a legal heir.

2. *b* Baſtards being children born out of lawful wedlock, or not within a proper time after its determination, cannot inherit.—They are conſidered as the ſons or children of nobody, or of every body, and no inheritable blood flows in their veins. Lands therefore will eſcheat to the ſtate, if there be no other relation to the laſt owner. Baſtards can have no other heirs than the iſſue of their own bodies: for as they are conſidered as the children of nobody, there can be no anceſtors, by which a kindred or relation can be made. Nor can the courſe of deſcents be traced through them. But they muſt be conſidered as beginning a new ſtock or family. The reaſon of excluding baſtards from the right of inheritance, is on account of the uncertainty of their anceſtors. But this rule is extended to caſes where there is no uncertainty, as the mother of a baſtard. Yet by the principles of the common law,

a 2 Black. Com. 246. *b* Ibid. 247.

if the mother dies, leaving lands, or the baſtard, leaving lands, and a ſurviving mother, they cannot be heirs to each other; but the eſtate ſhall eſcheat or go to the lawful heirs.

3. [c] Aliens or foreigners not belonging to this or any of the United States, are incapable of holding lands in this ſtate, by virtue of a ſtatute made for that purpoſe, and of courſe cannot be heirs. If then, a citizen of this ſtate die poſſeſſed of an eſtate, in lands, and leave relations that are foreigners, either reſiding in this ſtate, or in ſome foreign kingdom, they cannot inherit, but the lands ſhall eſcheat to the ſtate. So if a citizen ſhould leave remote relations that were legal inhabitants of this ſtate, and nearer relations that were foreigners, the remote relations belonging here, muſt inherit in preference to the foreigners.

In reſpect however to the lands that were holden in this ſtate by foreigners, at the time this act was paſſed, I preſume that they will deſcend to the heirs of ſuch foreigners, who ſhall continue to hold them till their death, in the ſame manner, as tho this ſtatute had never paſſed.

Chapter Nineteenth.

OF TITLE BY EXECUTION.

THE mode of acquiring title to real property by execution, was not derived to us from the law of England, for there, a title to lands in fee ſimple, cannot be acquired by the levy of an execution. But they may by force of the ſtatute of Weſtminſter ſecond, pray out an elegit, a particular kind of execution, by which half the lands of the debtor may be extended, and holden by the creditor until the debt be diſcharged. But in this ſtate, by force of the ſtatute, reſpecting the levying of executions, it has become a very common mode of acquiring the title to lands, by the levy of an execution. Whoever has an execution againſt a debtor, owning lands, may levy the ſame on them, provided the debtor is unable to diſcharge it by the payment of the money, or cannot tender ſufficient perſonal eſtate to ſatisfy it. The creditor however has no legal right to levy on real eſtate, if perſonal can be had. He has the right of

[c] Statutes, 83.

of election, reſpecting the taking of lands, and the debtor cannot tender them on the execution, to ſave his body from impriſonment: the creditor may elect, to take the body, or lands, but if perſonal eſtate can be found, it muſt be levied upon in preference to either. The officer cannot levy the execution on lands, without the expreſs direction of the creditor, tho they are inſerted in the execution.

The mode of proceeding being clearly pointed out by the ſtatute in this caſe provided, it will be ſufficient to recite that part of it which relates to this ſubject. [d] By this act it is enacted, that all lands and tenements, belonging to any perſon in his own proper right in fee, ſhall ſtand charged with all the juſt debts owing by ſuch perſon, as well as his perſonal eſtate, and ſhall be liable to be taken in execution for the ſame, where the debtor or his attorney ſhall not expoſe to view, and tender to the officer perſonal eſtate to anſwer the ſum mentioned in the execution, with all charges. And all executions duly ſerved upon any ſuch houſes, or lands, being with the return of the officer thereon, recorded in the records of lands in the town wherein ſuch houſes or lands are ſituate, ſhall make a good title to the party, for whom they were taken, his heirs and aſſigns forever: and whenever any execution ſhall be levied on lands, the ſame ſhall be appraiſed by three indifferent freeholders of the ſame town where ſuch lands lie, or if that town be a party, then of the next adjoining town, one of whom may be choſen by the debtor, and another by the creditor, and if they do not agree in chuſing a third, or if either party neglect to chuſe, the officer ſhall apply to the next aſſiſtant or juſtice of the peace, who by law, may judge between the parties in civil caſes, which authority, ſhall appoint one or more appraiſers, as the caſe may require, which appraiſers ſhall be ſworn according to law, and it ſhall be the duty of the officer who levies ſuch execution upon the lands, to cauſe the execution, with his endorſement thereon to be entered on the town records as aforeſaid, before he returns the ſame into the clerk's office of the court out of which it iſſued, and the officer ſhall have two ſhillings for cauſing the ſame to be recorded, with additional fees for his travel.

The Satute contemplates the levy of executions upon lands holden

[d] Statutes, 62.

holden by the debtor in fee, without mentioning any leſſer eſtate. But it is clear, that where a debtor holds a leſs eſtate in lands than a fee, the execution may be levied on the ſame, in the manner as the ſtatute directs in caſe of an eſtate in fee, by force of which, the creditor will acquire all the title which the debtor had in it, in the ſame manner, as he might by a deed deſcribing it as an eſtate in fee, and would have right to occupy and improve the ſame during the full term, to which the debtor was entitled. So the execution may be levied and proceeded with in the ſame manner as in caſes of levies on eſtates in fee: and in the return of the officer, the particular eſtate which the debtor has, may be deſcribed and appraiſed according to its value, having regard to its continuance, which levy would unqueſtionably convey to the creditor, the eſtate of the debtor: But then in all caſes, where a levy is made upon lands, in which the debtor has an eſtate, leſs than a fee, the whole eſtate of the debtor muſt be taken, ſet off, and appraiſed: for our law will not admit that a levy ſhould be made for any particular number of years, which are or may be leſs than the eſtate of the debtor, by which it would at the expiration of the time, for which it was taken, revert to the debtor. But the whole eſtate muſt be taken, and may by the appraiſers be eſtimated according to its real value.

Neither does our law admit the levy of an execution on lands, to be holden till the rents and profits diſcharge the debt.

A queſtion has often ariſen with reſpect to the power of creditors, to take by execution, crops growing on lands, which are cultivated by tenants at will, or by ſufferance, or on ſhort leaſes. An idea has been entertained, that the execution may be levied on the crops of graſs, or grain, or any thing elſe while growing, and that they may be ſevered and ſold as perſonal eſtate: but the law will not warrant ſuch a levy. In all caſes where a tenant at will, or by ſufferance, or on a ſhort leaſe, has grain or graſs or any other thing growing on the land, he has by law a right to all ſuch uſe of the land, as will be neceſſary to take the benefits of his grain, or graſs that is growing. While growing it is conſidered as a part of the realty. The only mode of courſe of proceeding againſt ſuch tenant, to obtain ſuch eſtate by execution, muſt be by

levying

levying upon the lands, and taking the whole of his eſtate however ſhort or long the duration may be, and by force of ſuch levy the creditor will acquire the ſame right, to gather the crops of the debtor, as the debtor had. But execution cannot be levied on graſs, or grain while growing, becauſe it is annexed to the realty, and ſuch levy can give the officer no right to enter on the land of another, to harveſt the grain, and carry it away. All crops belonging to any other perſon, than the owner in fee, are annexed to the freehold, and therefore cannot be conſidered as perſonal eſtate. But his right to carry them away, may be levied upon, as well as any other eſtate leſs than a fee.

e It has been determined, that the levy of an execution on a leaſehold eſtate, for the term of nine hundred and ninety-nine years, is good, and that ſuch a term is to be appraiſed, and not ſold at the poſt. This deciſion, fully recognizes the doctrine before laid down of the levy of executions on eſtates leſs than fee ſimple.

f In an action of diſſeiſin, the plaintiff claimed by the levy of an execution, to which the defendant made the following exceptions; that there was a written agreement, that the execution ſhould not be taken out ſo ſoon as it was by two months, that the juſtice who appointed one of the appraiſers, was not the neareſt juſtice to the land, that the appraiſer appointed by the debtor, and agreed to by the creditor, was tenant to the debtor, and not an indifferent freeholder: but the court determined that the written agreement was not admiſſible evidence to defeat the title of the plaintiff, that by next, the law did not ſtrictly mean the neareſt, but ſome in the town where the land lies, if there be none there, then the next living out of town: and that the tenant of a party was not excluded by law, from being an appraiſer: and where the parties had knowingly agreed upon him, they are eſtopped to ſay he is not indifferent, eſpecially the debtor, whoſe tenant he is, and who choſe him.

g It has been decided, that where a perſon obtains a judgment againſt an abſent debtor, and prays out execution, without giving bonds to refund according to the ſtatute, and levies his execution on

e Man vs. Carrington, S. C. 1793. *f* Cheeſeborough vs. Clark and Fanning S. C. 1789. *g* Marcy vs. Ruſs, S. C. 1790.

on lands, that ſuch levy is good, tho no bond was given, for the proviſion of the ſtatute is in favour of the debtor only, and not of creditors.

c It has been adjudged, that if the creditor and debtor agree on appraiſers who are not freeholders in the town where the land lies, that the levy of the execution will be void, becauſe the agreement of the parties cannot alter the law.

d A levy of an execution on lands, has been adjudged to be good, tho it did not appear from the officer's return, that he had made a previous demand of ſatisfaction of the debtor. But it appeared that the debtor appointed one of the appraiſers, by which it might be preſumed, that the demand was made, or the debtor agreed to wave it ; but regularly ſuch demand ought to appear from the return of the officer. *d* A creditor levied execution on lands, and procured the levy to be recorded in the office of the town clerk, but neglected to procure it to be recorded by the clerk of the county court, till after another creditor had procured a levy of an execution on the ſame land, and cauſed it to be recorded with the town and county clerks. The laſt levy was held good, tho the creditor knew of the prior levy, becauſe the ſtatute is expreſs and poſitive, that the levy muſt be recorded by the clerk of the court whence the execution iſſues, to make it valid.

Chapter Twentieth.

OF TITLE BY POSSESSION.

By our law, in no inſtance can a man obtain even a temporary title to land by occupancy, on the principle that it has aſſigned no legal determinate owner : but where the owner neglects to keep poſſeſſion of his lands and permits a perſon to occupy it, for the term of fifteen years, without enforcing his claim, ſuch occupant during this time, is deemed a treſpaſſer, but at the expiration thereof, his occupancy becomes transformed into a title, which the original proprietor cannot defeat.

In a review of the ſyſtem of our laws, we find that it has been the

c Chapman vs. Griffing, S. C. 1790. *d* Topliff vs. Davis, 1792.

the policy of the legiſlature to narrow the ſources of litigation by a variety of ſtatutes of limitation. For the purpoſe of avoiding ſuits, reſpecting controverted titles to lands, and to reduce them to the utmoſt ſimplicity, we find a ſtatute enacted in a very early period of our government, that limits our reſearches for titles to lands to the ſhort period of fifteen years.

The ſtatute in ſubſtance enacts, that any perſon who has any right or title of entry into any lands or tenements, with held from him, ſhall not make entry into the ſame, but within fifteen years next after the right or title thereto ſhall deſcend or accrue to him; and in default of ſuch entry, ſuch perſon and his heirs, ſhall be utterly excluded and diſabled from ever making the ſame after that time. In this ſtatute there is a proviſo in favour of infants, femecoverts, married women, perſons non compos mentis, impriſoned, or beyond the ſeas, at the time the right or title ſhall deſcend or accrue, and of their heirs—and they may notwithſtanding the expiration of the time of fifteen years, bring their action, or make their entry: but this muſt be done within five years after arriving to full age, diſcoverture, recovering their reaſon, enlargement out of priſon, or coming into New-England, or the ſtate of New-York, and their heirs muſt make their entry, or bring their action, within five years after the death of the perſon, in whoſe right they claim, and at no time afterwards.

The expreſſion of the ſtatute taking away the right of entry, we ſhould at firſt bluſh ſuppoſe intended nothing more than to drive the perſon to his action at law, and only exclude him from ſubſtantiating his claims by his own act of entry. For at common law a perſon may be debarred of his right of entry, and yet have a right of action: as where diſſeiſor dies, and the land goes into the poſſeſſion of his heirs, the proprietor is excluded from his entry, and driven to his writ of right. But we muſt conſider that by our law every perſon who has the right of property in lands, has the right of entry, as well as the right of action; that therefore the excluſion of the right of entry, by a parity of reaſon, ſhall exclude the right of action and tho the firſt part of the ſtatute ſays nothing reſ-

pecting actions, yet in the proviſo of the ſtatute made in favour of perſons under certain legal diſabilities, the right of action, as well as the right of entry is taken away, after the expiration of the limited time. This clearly manifeſts the intent of the legiſlature, and the uniform conſtruction of the courts of law has been, that the ſtatute in all caſes takes away the right of action as well as the right of entry.

A perſon to acquire title by poſſeſſion, muſt have the actual occupancy and improvement of the lands. It is generally underſtood that they muſt be incloſed with a fence to give ſuch a poſſeſſion as the law contemplates. This unqueſtionably is the moſt concluſive evidence of poſſeſſion, but it is poſſible, that a perſon may have the actual improvement of unincloſed land in ſuch a manner as to amount to poſſeſſion, and be capable of legal proof: as where a man conſtantly takes his fire wood from timber land, and takes care of it as his own. For the law goes on the principle, that a total dereliction of property on one part, and an uninterrupted exerciſe of the acts of ownerſhip on the other part, is the rule to decide the title. But where the lands are unincloſed, and neither party can be ſaid to be improving, the law conſiders the real owner to be in poſſeſſion.

A perſon to acquire this title to lands, muſt hold the poſſeſſion by a title or claim adverſe to and independent of the proprietor, for where a perſon enters by the conſent of the owner, and can even by implication be conſidered as holding under the true owner, the poſſeſſion ſhall not be deemed adverſary, but the poſſeſſion of the true owner, and no title acquired by it. For the poſſeſſor is ſuppoſed to deny the right of the owner, and the owner to relinquiſh it. Therefore where there is an implied recognition of the rights of the owner, the poſſeſſor is acquiring no title. [i] Therefore in caſe of a mortgage deed, as a ſecurity for money borrowed, if the mortgagor continue in poſſeſſion, for more than fifteen years, yet he is in, by the conſent of the mortgagee, holding under him, and he ſhall never acquire a right of poſſeſſion againſt his deed.

The law conſiders the owner abandoning his property, as a forfeiture

[i] Beach vs. Royce, S. C. 1791.

forfeiture of his title, but does not expreſsly decide in whom it ſhall veſt: but the implication neceſſarily is, that the perſon who happens to be in the poſſeſſion at the time the ower is diveſted, muſt become veſted with the property. He has a right to hold the eſtate againſt the former owner, as well as every body elſe. As the property does not eſcheat, and as there muſt be an owner to every thing, the conſequence is, that he acquires the title. The law does not require that the poſſeſſor at the expiration of fifteen years, ſhould have had the occupancy during the whole of that period, to give him the property. It is ſufficient, that the proprietor has been out of poſſeſſion during that time, and tho there may have been a number of perſons occupying during the time, yet the poſſeſſor at the expiration of the fifteen years, muſt receive the title at the moment it paſſes, by operation of law, from the proprietor. The law therefore cannot be ſuppoſed to require that peaceable and uninterrupted poſſeſſion, on the part of the poſſeſſor, as is required at the common law in the acquiſition of rights by preſcription. Yet where the owner keeps up his claim by entry, or by bringing actions, ſo that there cannot be ſupppoſed to be an abandonment of his right, the ſtatute will not run againſt him. So where there are joint tenants, tenants in common, or coparceners, and one of the tenants is under either of the diſabilities, provided for in the ſtatute, ſo as to ſave his right, this ſhall ſave the right of all the tenants, tho under no legal diſability, becauſe the eſtate being joint, the ſaving of it for one, muſt ſave it for all.

Chapter Twenty-first.

OF TITLE BY FORFEITURE.

By the laws of England, a perſon forfeits all his eſtate, both real and perſonal, for almoſt every crime that can be committed. This extreme ſeverity probably aroſe from the ferocious, and vindictive ſpirit of the age in which the laws were made: but in this ſtate, the enlightened minds of the people, revolted at the ideas of cruelty and barbarity in the puniſhment of crimes. They were ſatisfied with puniſhing the offender without extending the puniſh-

ment to his innocent family, and adding to their misfortunes, by plunging them into poverty. Influenced therefore, by theſe humane and benevolent ſentiments, the legiſlature, has in one inſtance only ſubjected a criminal to the loſs of all his eſtate. [k] This is for the crime of burning, or attempting, or conſpiring to burn public magazines, or veſſels, or betray public veſſels to the enemy in the time of war. This crime works a forfeiture of the offender's eſtate, both real and perſonal, at the diſcretion of the ſuperior court. This is the only crime for which real eſtate can be forfeited, and this and man-ſlaughter are the only crimes which work a forfeiture of goods and chattels. In all other caſes, the ſtatute concerning the age, ability, and capacity of perſons declares, that ſuch perſons as are condemned to death, the charges of their proſecution, impriſonment and execution, being firſt paid out of their eſtates, the remainder ſhall be diſpoſed of according to law. Where the crime is not puniſhable with death, the criminal holds his eſtate, after paying, his fine (if that be the puniſhment,) and the coſts of proſecution.

During the late war with Great-Britain, all perſons that were adjudged guilty of the crime, of having voluntarily joined and put themſelves under the protection of the enemies of the United States, forfeited their lands to the ſtate. But this was only intended for a temporary law.

Chapter Twenty-Second.

OF TITLE BY ACCESSION.

THE principle of the law is to aſſign to every thing capable of ownerſhip, a certain and determinate owner; and to leave nothing to be acquired by occupancy, which is the original foundation of all property. Therefore in caſes of alluvion and dereliction of the ſea and rivers, which are a gradual acceſſion of property, the law has determined that the perſon who owns the thing, to which the acceſſion is made, ſhall be entitled to the acceſſion. I have therefore conſidered this as a title acquired by acceſſion, and have ventured to treat of it under that name (as it was not reducible to any

[k] Statutes, 66.

any former head) for the purpoſe of illuſtrating every principle of importance, that reſpects our landed property.

l Alluvion is an imperceptible addition made to lands by the waſhing of the ſea, or rivers, and the addition muſt be ſo gradual that it is impoſſible to aſcertain how much ground is added in the ſpace of each moment of time. Thus the gradual alteration of the courſe of a river, will add to one and diminiſh the other bank. Where this change is ſo gradual, as not to be perceptible in any one period of time, the proprietor whoſe bank of the river is encreaſed is entitled to the addition. So where the ſea waſhes up the ſand, and gradually makes firm ground, the adjoining proprietor is entitled to the addition.

m Dereliction is where there is gradual ſubſiding of the ſea, below the uſual watermark, in which caſe—if it be imperceptible at any one period of time, the adjoining proprietor is entitled to it. For the purpoſe of explaining this ſubject, it is neceſſary to conſider, in whom is the property of the ocean and the rivers.

All rivers not navigable, belong to the proprietors of the land in which they flow. If their be adjoining proprietors on a river not navigable, and ſuch river be the dividing line, each proprietor owns to the center of the river. This has been adjudged in caſes, where the proprietors in the original grants to them were bounded upon the river. Hence, it may be ſaid to be a principle of law, that all ſtreams not navigable, are owned by private perſons, and that they have the ſame power to exclude all perſons from the uſe and improvement of ſuch ſtreams, as they have from uſing their lands.

All rivers that are navigable, all navigable arms of the ſea, and the ocean itſelf on our coaſt, may in certain ſenſe be conſidered as common; for all the citizens have a common right to their navigation; but all adjoining proprietors on navigable rivers, and the ocean, have a right to the ſoil covered with water, as far as they can occupy it, that is to the channel, and have the excluſive privilege of wharfing and erecting piers on the front of their land. Any perſon therefore has a right to ſail through the water, that covers the land of another, without being liable for a

treſpaſs

l Juſtinian's inſt. l. ii, tit. 1, ſect. 20. *m* 2 Black. Com. 261.

treſpaſs, in the ſame manner, as one may paſs through the air which is above the land of another: but no man has a right to do any act in the navigable waters, upon the front of another's land, which can affect the ſoil, as wharfing, or erecting piers: for in this there is an excluſive property, tho there is not in the water.—Nor may adjoining proprietors erect wharves, bridges, or dams acroſs navigable rivers ſo as to obſtruct their navigation.

n Having conſidered who are the proprietors of the ſea and of rivers, I proceed to remark, that in rivers where the alteration is not gradual, as in alluvion, but is ſudden as an avulſion, or where a part of one bank is violently torn away, and carried and annexed to the other, then the proprietor from whoſe bank ſuch land is torn, ſhall continue to own it, becauſe he is able to diſtinguiſh and aſcertain his property. In all rivers not navigable, it is clear that the adjoining proprietor or proprietors ſhall own all iſlands that may ariſe. If there be two proprietors owning on each ſide the river, then if the iſland riſes in the middle of the ſtream, it ſhall be divided between them: if on either ſide, then the proprietor to whoſe bank the iſland is neareſt ſhall own it. But if a river divides itſelf and afterwards unites again, by which it reduces a tract of land into the form of an iſland, the land ſtill continues in him to whom it before appertained.

o If there be a ſudden dereliction of the ſea, by which a large tract of firm land is formed, or if iſlands appear in the ocean, or in navigable ſtreams, ſuch lands and ſuch iſlands, are the property of the public, becauſe they ſpring out of the ocean, and navigable rivers, which are public property. *p* By the Roman law ſuch iſlands ariſing in the ſea, would belong to the firſt occupant; and the iſlands ariſing in navigable rivers to the adjoining proprietors, in like manner, as by our common law in ſtreams not navigable. This is the only material difference between the common and the Roman law, and it is apparent that the principles of the common law reſpecting alluvion was borrowed from the Roman code.

q If a river not navigable ſhould ſuddenly change its channel, the deſerted bed of the river would be the property of the adjoining

n Juſtinian's Inſt. L. II. Tit. I Sect. 21, 22. 2 *o* Black. Com. 262.
p Juſtinian's Inſt. L. II. Tit. I Sect. 22. 2 Black. Com. 262. *q* [illegible]

joining proprietors, in like manner as they own the river: but if a navigable ſtream ſhould ſuddenly deſert its channel, and form a new, it would be reaſonable that the proprietors of the land through whoſe land the new channel is made, ſhould have the old channel, as a compenſation for the loſs of their land, which becomes public property by the flowing of the river through it.

Having conſidered the right of property in the ocean, and in the Rivers, it may not be improper in this place to conſider the right of fiſhery.

The right of fiſhery muſt clearly follow the right of property in rivers, and ſeas. In all rivers and arms of the ſea, not navigable, the adjoining proprietors have unqueſtionably the excluſive right of fiſhery. Tho they cannot be ſaid to have a property in the fiſh ſwimming in the ſtream, and before they are caught, yet they have the excluſive right to take them, and whoever diſturbs that right is a treſpaſſer. Of courſe if a perſon takes fiſh in a river not navigable, without going on to the land of the adjoining proprietor, he is a treſpaſſer; and this principle is neceſſary to eſtabliſh excluſive property in individuals, to prevent the inconveniences which will neceſſarily ariſe from the operation of that erroneous opinion that fiſhing is common.

Tho it may be conſidered as a general princple, that in navigable rivers, and the ocean, the right of fiſhery is common, yet it is under this reſtriction, that every proprietor is deemed to have the excluſive right of fiſhery in rivers, and ſeas adjoining his land, ſo far as he has the right of the ſoil, that is, to the channel; and that no perſon may take oyſters, or any ſhell-fiſh from their beds, in the front of another's land, or draw a ſein for other fiſh within the limits above deſcribed, tho he does not for that purpoſe, enter upon the lands of the adjoining proprietor. [r] In an action of treſpaſs for fiſhing, by drawing a ſein in a navigable river, upon the front of another's land, tho it appeared that no entry was made upon the land of the adjoining proprietor, yet it was held, that the action was ſuſtainable in his favour.

The taking of fiſh in this ſtate, is regulated by a great variety of ſtatutes

[r] Adgate vs. Storey, S. C. 1790.

ſtatutes, in ſuch a manner as to give to the proprietors adjoining on rivers the fairelt and moſt equal chance of fiſhing, upon all parts of the rivers, but they are too numerous to be explained in in this place.

Chapter Twenty-Third.

OF THINGS PERSONAL.

THINGS perſonal, are of a moveable nature, and may be tranſported by the owner wherever he pleaſes. They alſo include a ſpecies of property already mentioned, which is of a real as well as perſonal nature, comprehending the immobility of the one, and the limited duration of the other, as eſtates for years. This might with propriety be conſidered, as a diſtinct ſpecies of property, but has ever by writers on the law, been treated as a branch of things perſonal. To obtain a clear underſtanding of this ſubject, we muſt conſider that things perſonal are alſo called goods and chattels. Chattels are divided into chattels real and chattels perſonal.

Chattels real, are ſaid to concern or favour of the realty. They are a kind of an eſtate which may be had in things real, inferior to a freehold: ſuch are eſtates for years, at will, and by ſufferance. They are intereſts annexed to, and iſſuing out of real eſtates. They poſſeſs the immobility of things real, which has given them the denomination of real, but as they are of a limited duration, they are conſidered as partaking of a quality of moveable things, and of courſe they are called chattels real. This ſubject we have fully handled in the foregoing part of our enquiries, and it is mentioned here only, to diſplay the connexion between the different branches of our ſyſtem of juriſprudence.

Chattels perſonal, are properly things moveable. They contain all thoſe things in which a man can have property, that are capable of being removed, from place to place, and attend the owner wherever he goes. But we muſt here obſerve, that there are many things annexed to the freehold, which are capable of being ſevered and transferred from place to place, as corn and fruits of

every

every kind. So long as they are annexed to the freehold, they are conſidered as part and parcel of the realty. But when they are ſevered, they are conſidered as things perſonal.

Property in chattels perſonal, or things moveable, may be either in poſſeſſion, or in action. Property in things perſonal in poſſeſſion, is where the owner has not the only right to enjoy, but the actual enjoyment. Property in action, is where the owner has nothing but the naked right to enjoy, unaccompanied with actual poſſeſſion and enjoyment.

I. Of chattels perſonal in poſſeſſion, a man may have an abſolute right of property, and a qualified, limited, or ſpecial right.

1. [f] A man may be ſaid to have an abſolute property in a thing in poſſeſſion, where he has the ſole excluſive right and occupation. Such property may be had in all inanimate things. So abſolute property may be had in all animals of a tame and domeſtic nature. Such as horſes, kine, ſheep, poultry, and the like.—For a man may have as abſolute poſſeſſion of ſuch animals, as he can of inanimate things, and they never go out of his poſſeſſion, unleſs by accidental ſtraying, or a tortious taking, in which caſes, the owner does not loſe his property. The ſtealing of domeſtic animals, is puniſhable as a crime.

In regard to the offſpring of domeſtic animals, it is the general rule, that they belong to the owner of the mother or dam, on account of the uncertainty of the male, and the expenſe of ſupporting her, and her uſeleſſneſs during the time of pregnancy. An exception is made in the caſe of ſwans, the offſpring of which is to be equally divided, becauſe the ſame attention is requiſite in the male and female, and this rule muſt apply to all animals that aſſociate in pairs.

2. [t] A perſon may have a qualified, limited, or ſpecial property to certain things in poſſeſſion. This qualified property may be had in animals of a wild nature, and tameable diſpoſition: but an abſolute property can never be acquired in them. Where a perſon has by art, induſtry, and education, reclaimed an animal from its wild ſtate, and rendered it tame, ſo that it remains quietly, in

[f] 2 Black. Com. 384. [t] Ibid. 391.

his own cuſtody, or where a man has confined an animal in his own immediate poſſeſſion ſo that he cannot eſcape, he thereby acquires a qualified property in it. But theſe rules apply only to thoſe animals which uſually are wild, thoſe animals which we continually find tame, tho they might originally have been wild, yet they are now conſidered as being ſubject to abſolute ownerſhip.

Animals of a wild nature are of two kinds: thoſe which are of a tameable and thoſe which are of an untameable diſpoſition.—Tameable animals may by the art and induſtry of man, be ſo far reclaimed from their wild ſtate, as to remain voluntarily in the poſſeſſion of the owner, and if they wander out of his poſſeſſion, they have the inclination of returning, and will return again of their own accord. While animals of a wild nature poſſeſs this diſpoſition of returning to their owners, tho permitted to go at large, yet they are conſidered as their property: but when they loſe their diſpoſition of returning, and gain their natural liberty, the owner becomes diveſted of his qualified property. This qualified property comprehends deer in parks, hares or rabbits in warrens, and doves in a dove houſe. Animals of a wild nature, and untameable diſpoſition, cannot be conſidered as the property of any perſon, only while they are confined by him and are in his actual poſſeſſion and power. When they are at large, the property ceaſes, and they may be taken by any perſon, unleſs the owner ſhould immediately purſue them on their eſcape, and then he will undoubtedly have a better right to retake them, than any other perſon.

Every ſpecies of wild animals is ſubject to this qualified property on being reclaimed or confined: and when they become wild again or eſcape, any perſon may acquire in them the ſame kind of property. A qualified property may be had in bees, when reclaimed and hived, but reducing of them to poſſeſſion, by hiving them, is neceſſary to obtain a property in them. It is therefore ſaid, that if a ſwarm light on my tree, the property is not mine, till I have hived them, and if another perſon do it, he will gain the property. If a ſwarm fly from my hive, they continue mine, ſo long as I can keep in ſight and purſue them: but when I have loſt them, ſo as

to

to be unable to ſhew that they went from my hive, the property is gone.

[u] It has been adjudged by the ſuperior court, that a man's finding a hive of bees in a tree, upon another man's land, gives him no right to the tree or the honey, and that a ſwarm going from a hive, if they can be followed and known, are not loſt to the owner.

This qualified property in animals of a wild nature, may be defeated by ſuffering them to go at large, and regain their native wildneſs: but while it continues, it is under the protection of the law, and an action will lie in favour of the owner againſt any perſon that injures, kills, or detains them. This difference however is made, where the animals are fit for food, and of real benefit to the owner, it is a crime to ſteal them, puniſhable by law: but where the animals are kept merely for curioſity, as dogs, cats, apes, parrots, and ſinging birds, the ſecret taking of them, can never in the eye of the law be deemed theft: becauſe their value is not intrinſic, but merely ideal, depending on the whim of the owner. Such violation of this property, is a treſpaſs, and an action will lie to recover damages.

A perſon is ſaid to have a qualified property in animals on account of their inability. As when birds build neſts on trees, or any wild creatures make their holes in a man's land, and have their young there, the owner of the ſoil has a qualified property in ſuch young animals, till they are capable of flying or running away, and then the property ceaſes. If any perſon ſhould take or deſtroy them, they would be liable to an action of treſpaſs. So if a ſwarm of bees ſhould take poſſeſſion of a hallow trunk of a tree on my land, and ſhould there depoſit their honey, tho I could not have a qualified property in the bees, becauſe they could remove where they pleaſed, yet I might in the honey, and any perſon who ſhould cut down ſuch tree and take the honey, would be a treſpaſſer and liable to an action.

[w] The only kind of wild animals, which our law protects in the poſſeſſion of the owner, are deer. A perſon for killing or deſtroy-

[u] Merrills vs. Goodwin, 1790 [w] Statutes 36.

ing deer in a park, incurs a forfeiture of ſeven pounds, and the value of the deer, and a fine of thirty ſhillings: and for pulling down a park, thirteen pounds beſides the damages. No perſon may kill a deer within two miles of a park under the penalty of ten pounds.

A man may have a qualified property in the elements of fire, of light, of air, and of water: this however can ſubſiſt only, while he has the actual uſe and occupation of them, for they being of a fugitive nature, he cannot have the ſame permanent property as in land. If a perſon has the actual uſe of them, and his poſſeſſion is diſturbed, action will lie to recover damages.

If one obſtructs another's ancient windows, or corrupts the air of his houſe or gardens, fouls his waters, or unpens and lets it out, or diverts a water courſe, the law will give the party injured juſt damages. This property however ſubſiſts only while it is in actual poſſeſſion, and when it goes out of poſſeſſion it becomes common again.

A man may have a ſpecial or limited property in things capable of abſolute ownerſhip, on account of the particular circumſtances of the owner, as in caſe of bailment or delivery of goods to another, for ſome ſpecial purpoſe, as to carry to ſome place or to keep ſafely. Here can be no abſolute property becauſe the right and the poſſeſſion are ſeparated, one having the right, and the other only a temporary right to poſſeſs, accompanied with actual poſſeſſion. The owner is ſaid to have a general property, and the poſſeſſor a ſpecial property, and in caſe the things are damaged, or taken away, both have a right of action, the bailee on account of his immediate poſſeſſion and reſponſibility to the owner: and the bailor, by reaſon of his right of property. But one action however can be ſupported in ſuch caſes; the recovery of one will bar the other. So in caſes of goods pledged, or pawned upon certain conditions. Both pawner and pawnee have a qualified, but not an abſolute property till the conditions are performed or violated, and then an abſolute property is veſted in one, or the other. So in caſes of attachment, the officer has a qualified property in the eſtate attached, and may maintain an action for the recovery

recovery of it, if taken away. So an executor or adminiſtrator has a qualified property in the goods of the deceaſed, and may maintain actions for their recovery: but the general property reſts in the heirs, legatees, and creditors. But a ſervant who has the care of his maſter's eſtate, has neither the property nor poſſeſſion, qualified or abſolute, but only a mere charge and overſight, and of courſe, the poſſeſſion of the ſervant, is the poſſeſſion of the maſter.

II. * Of things in action; which are, where a perſon has not the poſſeſſion and enjoyment, but a right to poſſeſs and enjoy the thing in queſtion, and which is recoverable by action.

Wherever a man has a challenge or demand upon another, for a matter of debt or damages, it is called a thing in action. There is a naked right to ſomething, it is merely ideal, and exiſts only in contemplation of law. This right of action may however be exerted and obtain ſubſtantial eſtate, which is called, reducing a thing in action into poſſeſſion. All debts due by ſpecialty or ſimple contract, all promiſes expreſs or implied, are things in action. The contracts of mankind may be branched into an unbounded variety, and the injuries which individuals may receive from each other, cannot be enumerated: for all theſe the law has furniſhed remedies; and while the mere rights exiſt, they are called things in action. Theſe rights may be carried into effect by bringing ſuits, by which ſubſtantial property may be acquired in ſatisfaction of damages. A thing in action cannot be transferred by our law, ſo as to place the party to whom the conveyance is made, in the ſame ſituation with the original party.

I ſhall cloſe my remarks on this ſubject, by obſerving that a right to perſonal eſtate may be created to commence in future, that by will, perſonal eſtate may be given to one perſon during life, and then to another forever; and that the ſame article may be owned by a number, as joint tenants, or tenants in common, in which caſe they muſt all join in any ſuit reſpecting it.

CHAP.

* 2 Black. Com. 396.

Chapter Twenty-Fourth.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE have conſidered the nature of things perſonal and now proceed to treat of the various titles by which they are holden. The original title to property has already been remarked, to have been occupancy: and ſince the eſtabliſhment of civil ſociety, all the other modes have been introduced for the purpoſe of rendering the poſſeſſion of property ſafe, and to prevent the diſputes that muſt conſtantly ariſe in a recurrence to the original, natural right. But as there are ſome inſtances, in which it is difficult to deſignate the particular owner, it is neceſſary to reſort to the natural title of occupancy. Yet in all ſuch caſes the law has pointed out the circumſtances under which the right may be exerciſed, ſo as to prevent any controverſy or doubt.

1. *y* It is conſidered as a principle of the law of nations, that any body has a right to ſeize and appropriate to his own uſe, the goods of an alien enemy: for when nations are at war, it is conſidered as conſiſtent with juſtice and good policy, to annoy each other by every poſſible mode. Nor can it be ſtrange, that ſuch a principle has been adopted when we conſider, that in the early ages of mankind, and among all barbarous nations the great object of war has been plunder. This has been exemplified in a ſtriking manner, by the conduct of the European nations in the dark ages, when whole nations engaged in the buſineſs of piracy, like the modern ſtates of Barbary. This unqueſtionably is the origin of the preſent practice of privateering, which has however been ſyſtematized by regulations of law, tho not defenſible upon the principles of moral right. Private perſons are not ſuppoſed to poſſeſs this power, but it reſides in the ſupreme government of the nation, who may grant commiſſions to private perſons, to make captures on the high ſeas, of the property of the enemy; and then ſuch property ſo taken, ſhall veſt in the captors. If an alien enemy bring goods into the country, after declaration of war, they are liable to be ſeized, unleſs he comes under the protection of a paſſport, or ſafe conduct. But if an alien enemy, chance to be

y 2 Black. Com. 401.

be in the country, at the time of the declaration of war, his property is not expoſed to be taken. But as the laws reſpecting privateers and letters of marque, are derived from the law of nature and nations, it will not be expected that I enter into any further inveſtigation of this ſubject, in this place.

2. The title to waiſs, ſtrays, loſt goods, wrecks, and treaſure trove, is founded in occupancy; the firſt, and laſt are regulated by the common law, and the other by ſtatute.

1. Waiſs are goods ſtolen and waived, or thrown away by the thief in his flight, for fear of being apprehended. If the owner can be known, the goods belong to him, but if no owner can be found, then to the firſt occupant.

2. Treaſure trove, is where any money, or coin, ſilver, plate, or bullion are found hidden in the earth, or ſome private place, the owner thereof being unknown. Such treaſure belongs to the firſt fortunate finder: but if the owner be known, or can afterwards be diſcovered, it belongs to him. In England it is true, that waiſs and treaſure trove belong to the king; but in this ſtate as we have no ſtatute regulation, I preſume, that the common law right of the firſt occupant, muſt be eſtabliſhed.

3. [z] In reſpect of ſtrays and loſt goods, it is enacted by ſtatute, if any perſon take up any ſtray beaſt, or find any loſt goods, worth two ſhillings, the owner being unknown, he ſhall carry a true deſcription, with the natural and artificial marks, to the regiſter of the town, where found, within fourteen days, on penalty of forfeiting the value of the goods, or ſtray beaſt, one half to the complainer and the other half to the town treaſury. The regiſter is to record the deſcription and the name of the finder, and holder of the goods, or ſtray beaſt. If the owner appear in ſix months, and evidence his title to the property, it ſhall be reſtored on paying neceſſary charges, to be determined by the next aſſiſtant or juſtice of the peace. If no owner appear within ſix months, the regiſter appoints two freeholders, who under oath, eſtimate the value of ſuch goods or beaſt in money. If the owner appear in ſix months afterwards, make good his claim, and pay the neceſſary expenſes

[z] Statutes, 238.

expenſes, he ſhall have reſtitution, or the value according to the appraiſement at the election of the finder. If no owner appear in twelve months and a day, the value according to the appraiſement, after deducting juſt fees, to the keeper, finder, and regiſter, ſhall belong to the town treaſury, where ſuch goods or beaſt were found: and the ſelectmen are impowered to recover and receive the ſame. The goods or beaſts are to be at the riſque of the owner the firſt ſix months, the keeper being faithful in his care of them; and no beaſt may be taken up as a ſtray, unleſs found in a ſuffering condition.

4. [a] The ſtatute concerning wrecks of ſea, enacts, that if any ſhips or other veſſels, ſhall ſuffer ſhipwreck upon our coaſts, no violence or wrong ſhall be offered to perſons or goods: but their perſons ſhall be harboured and relieved, and their goods preſerved in ſafety, till proper authority be informed, and give directions. That whenever any ſhipwrecked property ſhall be diſcovered on any of our coaſts, it ſhall be the duty of the ſelectmen of the neareſt town, and lawful for any perſon to take the moſt effectual meaſures to ſave and ſecure the ſame, and if need be, ſuch perſon may apply to an aſſiſtant or juſtice of the peace, who is authoriſed to iſſue his proper warrant to ſome proper officer, to impreſs and call forth neceſſary aſſiſtance. Such perſons ſecuring ſuch property, ſhall immediately give notice to the judge of the county court in that county, who ſhall direct the ſheriff to ſeize the ſame, and keep it till diſpoſed of by order of ſaid court. That if any owner entitled by the laws of the land, or the laws of nations, ſhall appear within a year and a day after ſuch ſeizure, and claim the ſame, it ſhall be reſtored upon his paying ſuch reaſonable coſts and ſalvage to the perſon to whom it is due, as ſaid court ſhall order and allow. But if no owner appear within the time, make claim, and pay coſts and ſalvage, ſuch property ſhall be ſold by order of ſaid court, and the avails thereof, be lodged in the ſtate treaſury, after deducting reaſonable coſts and ſalvage for the perſons to whom due. If the property be of a periſhable nature ſuch court may at diſcretion direct it to be ſold, within the limited time, and retain the avails for the ſame purpoſes: and if no owner appear in a month, to pay

ſalvage

[a] Statutes, 264.

ſalvage and coſt, the court may at any time afterwards ſell ſufficient to pay the ſame.

3. The benefit of the elements of light, air, and water, may be taken and holden by occupancy. If a perſon has an ancient window that overlooks his neighbour's ground, his neighbour has no right to erect another building ſo contiguous to it, as to obſtruct the light: but if a perſon erect his houſe cloſe by the wall of another, ſo as to be incommoded by it, or cloſe by his houſe ſo that the light be obſtructed, he cannot compel him to pull down the wall, or the houſe; for the owner of the wall is the firſt occupant, and he having claimed his right, cannot be deprived of it. If a man ſhould erect a tan-yard, or exerciſe any noiſome trade, ſo near the houſe, or gardens of another, as to corrupt the air, and raiſe noxious ſtenches and unwholeſome ſteams, an action will lie againſt him in favour of the perſon injured; but when a man has once erected ſuch buildings, and is in the exerciſe of ſuch trades, and another perſon fixes his habitation ſo near, as to be offended thereby, he cannot maintain an action, becauſe the other perſon had the prior right by occupancy. If a ſtream of water flow thro a perſon's land, he has a right to take every natural, and artificial advantage of it, by erecting water-works, or flowing his land, provided he does not wholly divert the water-courſe, and deprive the adjoining proprietor, on the ſtream below, of water for neceſſary and ordinary purpoſes, as drink for his cattle.

4. The property of animals of a wild nature, while they are ſo, is acquired ſolely by occupancy. Any perſon has a right to take, and to kill all wild animals; when he has taken them, he acquires a qualified property, and when he has killed them, he acquires an abſolute property, and is by law protected in the poſſeſſion of them.

In England, and the European kingdoms, many wild animals, or as they are denominated, game, are by ſpecial prerogative veſted in the king and nobility, as hunting is eſteemed too princely and noble a diverſion for the people at large. The game-laws, which are calculated to preſerve the game, bear exceeding hard upon the liberty of the ſubject. But in this ſtate, the ſpirit of the people has

never been broken down by ſuch tyranny and oppreſſion. Hunting, fowling, and fiſhing, are conſidered as proper diverſions for every claſs of people, and may be ſaid to be free. Theſe ſports are laid under no reſtraints by law, and the people may enjoy them as they pleaſe, without reſtraint or danger of incurring any penalty. To hunt on another's territory, is a common cuſtom. No action will lie in favour of the owner of the land, for any injury for the act of hunting, becauſe the animals which are killed, being wild, cannot be his property. If any action can be maintained, it muſt be for the injury done by entering on the territory of another without his conſent, and the damage to his poſſeſſions. For this unqueſtionably an action would lie, as in legal conſideration it is a treſpaſs. *b*

5. *c* Acceſſion is a right of property grounded on occupancy, and herein the common law is copied from the civil law. Thus if any given corporeal ſubſtance, receive any acceſſion, by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the converſion of wood, or metals into veſſels and utenſils, the original owner is entitled to it under ſuch ſtate of improvement, but if the thing itſelf be changed, by ſuch operation into a different ſpecies, as by making bread out of another's wheat, there the property is changed, it belongs to the new operator, who is to make ſatisfaction to the former owner, for the things he has converted. It has been held that if one takes away another's wife or ſon, and clothes them, and afterwards the huſband, or father retakes them, the property of the garments ſhall ceaſe to be in him, who provided them, becauſe they are annexed to the perſon of the woman, or child.

6 *d* In caſe of the confuſion of goods, where thoſe of two perſons are ſo intermixed, that they cannot be diſtinguiſhed, and ſeparated, there if the intermixture be by conſent, the proprietors have an intereſt in common, in proportion to their ſhares; but where one wilfully intermixes his property with another's, without his conſent, he ſhall loſe it, and the whole ſhall veſt in the other, without being liable to make any compenſation. So in the caſe of acceſſion, if a perſon ſhould by his labour, or any other way increaſe,

b For the law reſpecting Fiſhing, ſee book III. chap. 22.
c Black. Com. 404. *d* Ibid. 405.

creaſe, improve, or add to the property of another, without his conſent and approbation, he cannot recover any ſatisfaction therefor, but if it be done by the direction, or conſent of the proprietor, the labourer is entitled to an adequate compenſation.

Chapter Twenty-fifth.

OF TITLE TO THINGS PERSONAL BY CONTRACT.

THE title to things perſonal, may be acquired in three modes, by the act of the party in taking the poſſeſſion of things in common, which is occupancy, and the original and ultimate foundation of all right: by the agreement or contract between perſons for the purchaſe and ſale of property, which is a derivative right: and by the operation of law, as in the caſes of title by deſcent, marriage, and ſundry others.

It is evident that individuals in the exerciſe of the right of occupancy and induſtry, in the cultivation of the ground, and in manufactures, muſt acquire a larger ſhare of ſome kinds of articles, than are neceſſary for their own conſumption, and a leſs quantity of others. This was the origin of traffic: and mankind by bartering and exchanging thoſe commodities, of which they had a ſuperfluity, for thoſe in which they were deficient, ſupplied their mutual wants, and furniſhed each other reciprocal accommodations. But when ſociety had become poliſhed, luxury encreaſed, and a taſte for the productions of remote countries introduced, it was found difficult to ſupply the multiplied, and artificial wants of mankind by exchange. This made it neceſſary to agree upon ſome particular article to be a *common ſtandard*, to aſcertain the comparative value of different commodities, and be the general repreſentative of property. The permanent ſubſtance of metals, rendered them the moſt convenient for this purpoſe. They were therefore adopted as the medium of exchange, and an imaginary value was ſtamped upon them, by the conſent and agreement of all nations. Money being eſtabliſhed as the repreſentative of property, facilitated the intercourſe of the remoteſt nations, and the introduction of commerce, diſtributed every where, the elegant and uſeful productions of the

moſt diſtant parts of the earth ; and laid the foundation of the unequal diviſion of property, by furniſhing to the ſuperior induſtry and capacity of individuals, thoſe means of accumulating riches, which were unattainable by perſonal labour in the rude and unpoliſhed ages of ſociety. Gold and ſilver, inſtead of being conſidered as of mere imaginary value, were deemed to be wealth itſelf, and the riches of a country, were eſtimated by the quantity of thoſe precious metals which it poſſeſſed. The diſcovery of America, opened to the avarice of mankind the rich mines of Mexico and Peru, and multiplied gold and ſilver to ſuch an amazing extent, as greatly to leſſen their value, and it is probable that the immenſe quantities that were in circulation, muſt have made it neceſſary to have introduced ſome other medium of commerce, had not the diſcovery of a paſſage by the cape of Good Hope, to the Eaſt Indies, opened an inexhauſtible demand for the gold and ſilver, that iſſued from the bowels of South America. The luxury of Europe, and America, has introduced a high reliſh for the elegant manufactures, and the delicious productions of the Eaſt ; but the extreme fertility of this county, has rendered unneceſſary the importation of commodities from other countries, for their own conſumption, of equal value with their exports, and of courſe this balance can be diſcharged only by ſpecie. The deſpotic governments of India, render the enjoyment of property precarious and inſecure, and the proprietors frequently conceal their treaſures in the boſom of the earth, for preſervation. The knowledge of the place of concealment muſt frequently be loſt, by the ſudden or violent death of the poſſeſſor, and a variety of circumſtances, reſulting from the numerous and frequent revolutions of the government. It is an intereſting ſpeculation to the philoſopher, to obſerve the numbers of unhappy wretches, that are buried in the mines of South America, inceſſantly digging for gold and ſilver, immenſe quantities of which, after circulating through many different countries, and being the ſubject of many negociations, ultimately find the way to the Eaſt Indies, and there return again to the bowels of mother earth, never to be called again into circulation, unleſs by mere fortuitous diſcovery.

The adoption of money as a medium of exchange, and the introduction

duction of commerce, have in a great meaſure ſuperſeded the original mode of acquiſition by occupancy, and have led the way to acquiſition by contract. This opens to us a moſt extenſive and important ſubject of enquiry. Contracts are the baſis of all human tranſactions, and the mode by which property is transferred, and acquired, in the unbounded variety of mercantile negociations.—The conſtruction of contracts, the compelling of their performance, and the awarding of compenſation for their violation, furniſh the principal ſubject on which courts exerciſe legal, or equitable juriſdiction.

e A contract is defined by the Roman law, to be the conſent of two or more, to the ſame thing.

f A contract is defined by the common law, to be an agreement upon ſufficient conſideration, to do, or not to do a particular thing. *g* A contract may be deſcribed, to be a tranſaction in which, each party comes under an obligation to the other, and each reciprocally acquires a right to what is promiſed by the other. In this definition and deſcription, are included every feoffment, gift, grant, leaſe, loan, pledge, bargain, covenant, agreement, and promiſe: for contracts may be conſidered as the general name, and theſe are the ſeveral ſpecies of contracts. By the laws of all nations, the conſent of the parties is the eſſence of the contract. But for the purpoſe of fully inveſtigating this important branch of our diquiſitions, I ſhall treat of it under the following heads,

1. Of the Parties to Contract.
2. Of the aſſent to Contracts.
3. Of the ſubject of Contracts.
4. Of the general nature of Contracts.
5. Of the Conſideration of Contracts.
6. Of the Interpretation of Contracts.
7. Of the ſeveral ſpecies of Contracts.
8. How Contracts may be diſannulled, reſcinded, or altered.
9. How Contracts may be fulfilled.
10. How Contracts may be releaſed.
11. How Contracts may be barred.

I. Of

e Eſt partio duorum pluriumve in idem placitum conſenſus.— 1 Domat's civil law, 32. *f* 2 Black. Com. 442. *g* 1 Powell on Contracts, 6.

1. Of the Parties to Contracts.

All perſons have the power of entering into contracts, unleſs diſqualified by certain legal diſabilities: but to aſcertain what perſons have a moral power to bind themſelves by their contracts and agreements, we muſt conſider the nature of aſſent. The term aſſent ſignifies the acquieſcence of the mind to ſomething propoſed, or affirmed, and involves in conſideration of law, firſt a phyſical power of aſſenting, ſecondly, moral power, and thirdly, a deliberate and free uſe of thoſe powers. Therefore the abſence of any of theſe capacities, in either of the parties, renders the perſon labouring under it, incapable of entering into an agreement to bind himſelf, or by virtue of his acts, others.

[b] Idiots and lunatics, labour under a moral incapacity to aſſent to contracts. They are not governed by reaſon, but are influenced by an irreſiſtible impulſe like machines. All acts that are done by them, are abſolutely void: but it ſeems to be a principle of the common law of England, that no man after the recovery of his ſenſes, ſhall be admitted to ſtultify himſelf, and plead his own diſability in avoidance of his contract; becauſe of the poſſibility that they may counterfeit ſuch diſability: [i] but by the practice of the courts in this ſtate, they have eſtabliſhed the doctrine, that a man may ſtultify himſelf in his own proper perſon, and may employ an attorney, and avoid his contract, by pleading his own diſability, even at the time while he is labouring under the incapacity.

Drunkenneſs, may be conſidered during its operation, as a temporay inſanity, yet as it is conſidered as a crime, and is of the party's own procuring, it will not be a ſufficient ground to authoriſe a perſon to reſcind his aſſent to the contract. Nor is it a reaſon for relief in equity, unleſs the perſon were drawn into ſuch debauch by the management and contrivance of him who gained the contract, and then equity may relieve. So of a man's being of a weak underſtanding, is no objection to his aſſenting to a contract: for courts of law cannot examine into the wiſdom and prudence of men, in their manner of tranſacting their concerns, and diſpoſing of their eſtates. If a man therefore be legally compos, be he wiſe

or

[b] 1 Powell on Contracts, 11, 14. [i] Moſſit vs. Davis, S. C. 1793.

or unwiſe, he has the abſolute diſpoſal of his eſtate, and will ſtand for a reaſon of his actions.

A perſon that is a lunatic, or non compos at times only, may bind himſelf by contracts, made during his lucid intervals.

k Infants are under a legal incapacity, to make contracts to their diſadvantage. The rule to decide the validity of their contracts, is whether there be an apparent benefit or ſemblance of benefit upon the face of the tranſaction. If neither of theſe appear, the contract is void: otherwiſe voidable or not, at the election of the infant, when he arrives at full age. But it is not neceſſary that ſuch aſſent ſhould be expreſs, it is ſufficient that acts be done, from whence an aſſent muſt neceſſarily be inferred.

l A married woman during her marriage, is incapable of aſſenting to a contract, to be binding on herſelf, or her huſband, for in conſideration of law, ſhe is under the dominion and coercion of her huſband and conſequently has no moral capacity to aſſent to a contract reſpecting his property, or her own. Perſons under overſeers, are by ſtatute, rendered incapable to make contracts.

2. Of the aſſent to Contracts.

m The aſſent to a contract, may be either expreſs or tacit.—Expreſs aſſent, may be manifeſted by ſome geſture, ſpeaking, or writing—or in ſome inſtances, by acknowledgment before magiſtrates, and this may be either precedent, concomitant, or ſubſequent.

A tacit aſſent may ariſe in ſeveral ways, it may ariſe from inaction or forbearance of action. A man by his ſilence, in caſe he be preſent and knows what is doing, is preſumed to give his aſſent to what is done, unleſs it appear that he was awed into ſilence or in any way hindred from ſpeaking.

n If a man make a leaſe to another, on good conſideration, and afterwards make a leaſe to a third for the ſame time, and the firſt leſſee aſſiſts in the bargain, and does not diſcover his leaſe, and it is not excepted in the ſecond leaſe, which is upon good conſideration, then the ſecond leſſee, will even at law be preferred. Put to

juſtify

k Cro. Car. 502. 1 Pow. Con. 32. *l* Ibid. 59. *m* Ibid. 131. *n* Ibid. 132. 134.

juſtify the concluſion from a man's ſilence, that he has relinquiſhed his right: two things are neceſſary, that he ſhould know what belongs to him, is conveying to another, for where one forbears to act through mere ignorance, it ſhall not prejudice him, and that he ſhould be voluntarily ſilent, tho he has full liberty to ſpeak; for if there be any compulſion to hinder his acting, there is no ground from his ſilence to infer his aſſent.

3. Of the ſubject of Contracts.

o Under this head we are to conſider the ſubjects reſpecting which, contracts may be made: and here a diſtinction is made between contracts, that are executed, and ſuch as are executory. It is a general rule, that a man cannot by a contract executed, grant or convey any thing, in which he has not an actual or potential intereſt, at the time of the grant or conveyance, becauſe it is neceſſary to enable a perſon to transfer property, to be himſelf the proprietor. Therefore all contracts executed, are void where the perſon making the conveyance, is not the owner at the time. As if a man ſhould grant all the wool, which he ſhould buy hereafter; this is a void grant, for he has not the wool, neither actually nor potentially.

p But where ſuch contracts are executory, operating as declarations precedent, and to the perfection of which, ſome new act is neceſſary, to give them life and vigor, the law admits of them, tho made before any intereſt veſted. As if a man covenant with another, to purchaſe a farm by a certain time, and give him a deed; this covenant would be binding, tho it be purchaſed after, becauſe there is a new act to be done, the giving the deed. But if there be no new act to be done, it would be otherwiſe, as if a man ſhould covenant with his ſon, in conſideration of natural love, to ſtand ſeized to his uſe, of the lands which he ſhould afterwards purchaſe, the uſe would be void: becauſe here no new act is to be done, and the father did not own the land at the time of the covenant.

q The ſubjects of contracts muſt reſpect things that are poſſible to be performed, and therefore all contracts to perform impoſſible things are void. As a contract to build a large houſe in a day, to go

o Pow. Con. 152. Plowd. 432. Hob. 132. p 1 Pow. Con. 158. q Ibid. 163.

go to Rome in the ſame time, to drink up the ſea, or to touch the ſky with one's hand, or any ſuch impoſſibilities, are all void: and the contracting party would not be ſubject to an action even for damages accruing by reaſon of non-performance. [r] But a diſtinction muſt be made between things naturally impoſſible, which muſt be evident to all the parties at the time of contracting, and things which are not phyſically impoſſible, but the impracticability of the accompliſhment ariſes from the circumſtances and ability of the party contracting: for in the latter caſes, tho the contract cannot be fulfilled by reaſon of the inability of the contractor, yet he will be liable to pay damages for a non-performance. [ſ] Thus where a perſon in conſideration of two ſhillings and ſix-pence paid in hand, and five pounds to be paid on the performance of the agreement, contracted to deliver to another two grains of rye-corn, on the Monday following, and ſo on progreſſively, doubling the quantity on every Monday, during the year; it was objected on an action of the caſe brought on this agreement, that it appeared on the face of it to be impoſſible, the rye to be delivered amounting to ſuch a quantity, as all the rye in the world was not ſufficient to produce. But the court determined, that if a man will for a valuable conſideration, udertake a thing impoſſible with reſpect to his ability, that will not make the contract void; for though the contract be a fooliſh one, yet it will hold in law, and the perſon contracting ought to pay ſomething for his folly.

All contracts to do any acts that are repugnant to law, are void, becauſe where the object of a contract is contrary to a man's duty, it may be preſumed that he did not give his full aſſent, eſpecially if it be to perpetrate a crime, and becauſe the law by forbidding it, takes from the contractor the power of obliging himſelf to perform it, and conſequently prevents the perſon contracting from gaining a right to require it to be done.

All matters againſt law are reducible to two heads, that is, things that are bad in themſelves, and things that are bad becauſe they are prohibited. [t] Of the firſt kind are all contracts, that have for their object ſomething forbidden by the moral law, as to commit murder, theft, perjury, and the like; which contracts acquire no additional turpitude, from being declared unlawful by the legiſlature.

[r] Pow. Con. 161. [ſ] 2 Ld. Raym. 1164. [t] Fitz. tit. obing. 13.

giſlature. Therefore an obligation to pay a man a certain ſum of money, if he will kill or rob another, is void. *u* So where the defendant's inteſtate gave to the plaintiff a bond, the condition of which was, that ſhe ſhould live with him in a ſtate of fornication, and that he ſhould leave her an annuity of ſixty pounds a year; the bond was held to be illegal, and void.

w But if a man debauches a woman before chaſte, or having ſeduced a woman before virtuous, gives her a bond as a recompence, or a proviſion for her ſupport, it is premium pudoris, and good in law.

x Contracts that have for their object things that are bad, becauſe prohibited, that is not bad in their own nature, as being repugnant to the moral law, but bad becauſe they are againſt the law of the land, are of three kinds, becauſe they are repugnant to the welfare of the ſtate, or againſt ſome maxim or rule of law, or in contradiction to ſome poſitive ſtatute.

All contracts are deemed repugnant to the welfare of the ſtate, which have for their object, the reſtriction of trade in general, manufactures and huſbandry. Thus, contracts that a man ſhould not exerciſe trade, or ſet up manufactures, or that a farmer ſhould not ſow his land, militate againſt national policy, and are void.— *y* But an agreement upon good conſideration, not to exerciſe a trade in a particular place, will be good; but if it be without conſideration, it will be void.

z A contract for lawful maintenance, or upholding a ſuit, is againſt law, and void. An obligation entered into with an alien enemy, has been held to be void, on the ground that ſuch communication with the enemy may endanger the public ſafety.

a All marriage brocage bonds, given for aſſiſtance in promoting marriage, are void, becauſe they militate againſt the general welfare of ſociety.

b All contracts and agreements, the objects of which militate againſt the principles of morality and public decorum, as is the caſe with all ſuch as are entered into, to give effect to corrupt purpoſes

u 2 Burr. 1568. *w* 3 Will. 339. *x* 1 Powell Con. 166. *y* Cro. Jac. 596. *z* 2 Lev. 212. *a* 1 Powell 174. *b* Ibid. 183.

purpoſes, are void: becauſe they are repugnant to the welfare of the ſtate, and againſt that rule of law, which prohibits every thing that is contrary to good manners. [c] Therefore if a perſon who wanted an office, converſing with a perſon who had moſt influence to obtain it, ſhould bet a conſiderable ſum with him, that he would not obtain the office, ſuch a wagering contract, tho innocent in itſelf, if unaccompanied with any ſiniſter view, yet being a mere color to diſguiſe the real intention of the party, namely, to purchaſe the office, which is an illegal act, the contract would be corrupt and therefore void. Upon the ſame principle, a wager entered into merely as a color to cover uſury, cannot be recovered by an action at law, for the moment that the truth appears, the contract, whatever ſhape it may aſſume, will remain to be governed by the ſame rule, as if the parties had expreſsly entered into the illicit and corrupt agreement.

[d] If a wager be laid, with one of the judges who are to decide upon a cauſe, reſpecting the deciſion of it, this would operate as a bribe, and nullify the contract. So if a wager be laid with a counſel or attorney on the adverſe ſide, as this would be to induce him to act treacherouſly in the cauſe, the contract would be void. [e] But a wager laid between a plaintiff and defendant, in a caſe whether a decree or judgment of the court be reverſed or not, on an appeal, the parties being upon equal terms, and the contract entered into without fraud, was held to be a valid contract, as not being prohibted by poſitive law, nor againſt any principle of ſound policy, nor againſt any legal maxim.

[f] All contracts that have any fraudulent object in view, are upon the ſame ground, void both in law and equity. A contract made with a view to defraud the government, would be void.— [g] Theſe principles extend to all contracts of an unfair nature, in reſpect of their influence on third perſons, altho otherwiſe, as between the parties to them, becauſe if their object be to impoſe upon third perſons, the parties to them cannot have a remedy in law or equity, for they are immoral. Thus if a man attend at auctions, to enhance the price of goods, he cannot ſupport an action at law, to recover a compenſation.

[c] Cowp. 37. [d] 1 Powell, 184. [e] Cowp. 37. [f] Douglas, 4 to.
[g] 1 Powell, 168.

[h] All contracts are void that reſpect things which are prohibited from being the object of contracts by ſtatute, as in the caſe of uſurious contracts for more than lawful intereſt.

[i] All contracts are unlawful which are intended to induce an omiſſion of ſomething, the doing of which is a duty, in the perſon with whom it is made. Thus if a ſheriff ſhould make an under-ſheriff, provided he ſhould not ſerve executions above twenty pounds, without his ſpecial warrant, this proviſo or agreement is void: for tho a ſheriff may do as he pleaſes in appointing an under ſheriff, yet if he does appoint one, he cannot abridge his power.

[j] A contract or agreement, is unlawful that is intended to encourage unlawful acts or omiſſions. Therefore if the proprietor of a newſpaper give the editor a bond of indemnity, againſt any indictment or action, to which he might thereafter be ſubjected, by reaſon of publiſhing libels or the like, ſuch bond will be void. So a bond to ſave harmleſs a ſheriff for embezzling a writ, would be void.

[k] Contracts that have a tendency to encourage unlawful acts, are void. As a wager between two people, that one of them, or a third perſon will beat another, is void, becauſe it is an incitement to a breach of the peace. So if the ſubject matter of a wager were the violation of chaſtity, or an immoral action, as if one betted that he could ſeduce ſuch a woman, ſuch contract would be void, becauſe it is an incitement to immorality.

[l] All contracts, which in their object, wantonly affect the intereſts of third perſons, or their feelings, and thereby diſturb the peace of ſociety, will be reprobated in a court of juſtice. [m] Therefore a wagering contract, that a woman has committed adultery, or that an unmarried woman has had a baſtard, will be void. For the law will not permit third perſons, for the purpoſe of laying a wager, wantonly to expoſe others to ridicule, and libel them under the form of an action. [n] So it has been determined, that no action will lie upon a wager, between indifferent perſons, reſpecting the ſex of a certain perſon, for they ſhall not be permitted

to

[h] 1 Powell, 186. [i] Ibid. 195. [j] Ibid. 196. [k] Ibid. 198. [l] Ibid. 232. [m] Coup. 732. [n] Ibid. 729.

to try by a wager, weether he is a cheat or impoſtor, and call upon his friends and confidential attendants to give evidence, to expoſe him.

o An action upon a contract that wantonly tends to introduce indecent evidence will not be retained in a court of juſtice. As if a wager were laid, that a woman had a peculiar defect, in a particular part of her body, or that ſuch perſon was an hermaphrodite, or had a particular diſorder, or as to the cauſe why a woman did not breed, or the like.

p But here it muſt be obſerved, that the contracts and agreements reſpecting things, which the law prohibits to be the ſubject of contracts, create no right, and conſequently occaſion no obligation on the other ſide, yet the law ſuffers them in ſome inſtances, after they have been carried into execution to ſtand contrary to its prohibition; for being executed they are valid between the parties, tho the law will not give its aid to either party, to carry them into execution. As for inſtance, if I game with a man contrary to law, and loſe, and pay him the money, I ought not to have recourſe to an action, to recover the money, if there be no cheat put upon me by him that has won it.

q But here a material diſtinction is to be made between the different ſorts of contracts, which are prohibited by law. Firſt, ſuch as are founded upon reaſons of policy, and public expedience, as where the act is in itſelf immoral, or a violation of the general laws of public policy. Secondly, ſuch prohibitions as are intended to protect weak, or neceſſitous men from being over-reached, defrauded, or oppreſſed—In the former caſes both parties are deemed equally guilty, and in the latter only one of them. The law therefore in the former caſes, allows no action for the relief of the party who has performed his part, after he has aſſented with full, and entire liberty, r for it is a general maxim that where the parties are equally criminal, the condition of the poſſeſſor is beſt, and that to him who is conſenting there is no injury. Therefore if one pay money fairly loſt at play, he cannot recover it back; ſo if one pay money as a bribe, he cannot recover it in an action, for both parties are equally criminal.

ſ But where contracts or tranſactions are prohibited by poſitive

o 1 Powell, 233. p Ibid. 200, 201. q 2 Burr. 1012. r In pari delicto melior eſt conditio poſſidentis—Volenti non fit injuria. ſ 1 Cowp. 701

tive ſtatute, for the ſake of protecting one ſet of men againſt another, the one from their condition, and ſituation being liable to be oppreſſed, and impoſed upon by the other, then the parties are not equally criminal; therefore the perſon injured after the tranſaction is finiſhed, may bring his action, and defeat the contract. For inſtance, by the ſtatute of uſury, the taking more than ſix per cent. being declared illegal, and the contract void, the borrower if he pays the illegal intereſt, may recover the exceſs of intereſt on an action: for this ſtatute was made to protect needy and neceſſitous perſons from the oppreſſion of uſurers, and monied men, who are eager to take advantage of the diſtreſs of others, whilſt they on the other hand, from the preſſure of their diſtreſs, are ready to come into any terms, and with their eyes open, not only break the law, but compleat their own ruin.

" If the illegal contract remain in an executory ſtate, and be not performed, then if the party who has paid money, as a conſideration for ſomething to be done wiſhes to reſcind his contract, he has the power to do it; for ſo long as nothing is done by either party, each is at liberty to recant, becauſe it is to be preſumed, that they have not acted with mature deliberation. As if a merchant has promiſed another to furniſh him with contraband goods, and they agree for a price, either may refuſe to ſtand to his bargain, which they ought not to have made. But then it muſt be done on the terms of reſtoring the party to his original ſituation. So where a ſum of money was paid to another, to procure a certain office, and it had not been procured, the party who paid the money recovered it back in an action, becauſe the contract remained executory.

" If the ſubject of a contract, or agreement be evidently uſeleſs, or tending to no conſequence if carried into execution, this will render it void. And the motive to conſider it ſo, is ſtill ſtronger, if it be of ſuch a nature, as if performed it brings no loſs, or prejudice to the party ſtipulating it, and if fulfilled will create trouble, or damage to the performer; becauſe engagements of this kind produce no obligation: for how can a man have a right of requiring me to put myſelf to any charge, toil, or trouble in doing

[a] Doug. 471. [u] 1 Powel, Con. 231

ing a thing, which ſhall profit him nothing, and it is indeed againſt reaſon to undertake an action which can produce no good, and may produce evil. As if a man had agreed not to waſh his hands, or comb his head, or change his linen, for a certain time, or to abſtain from eating ſeveral days, or the like.

v Contracts are void which are made on Sabbath or Lord's day. From ſundry adjudications, it appears to be the opinion of the courts, that the tranſaction of ſecular buſineſs, is unlawful only during the time, from morning light till evening; and that the law does not extend to the ſolar day. A note executed about noon on the Sabbath day, has been declared void. Notes executed on Saturday evening, and at two o'clock on Sunday morning, have been held good.

4. Of the general nature of Contracts.

w Contracts or agreements, are divided into executed and executory. A contract or agreement is ſaid to be executed, where two or more perſons make over their right to another, and thereby change the property, either preſently and at once, or at a future time, upon ſome event that ſhall give it full effect, without either party truſting to the other; as where things are bought, paid for, and delivered, or where a man has land, under ſome engagement, and diſpoſes thereof, at the time ſuch engagement ceaſes. Contracts executed, do not in general retain the name of agreements, but are denominated by ſome particular term, applicable to their nature. As a ſale, grant, leaſe, aſſignment, mortgage, and the like.

Executory agreements according to the ordinary acceptation of the term agreement, are ſuch contracts as reſt on articles, memorandums, parol promiſes, or undertakings, and the like, entered into, preparatory and introductory of more ſolemn, and formal alienations of our property, and free agency. All promiſes to give, grant and ſell, belong to the former claſs, and all promiſes or undertakings to do or ſuffer, belong to the latter claſs. A contract therefore, is ſaid to be executory, either when one party performs, and the other is truſted, as a loan of money, on a promiſe

v Vail vs Mumford, S. C. 1789. *w* 1 Powell, Con. 234.

miſe to ſecure it by mortgage of land: or when neither party performs and each truſts to the other, as a promiſe to take in charge in reſpect of a premium to be given, or a covenant, to make a leaſe, in conſideration of a ſum to be paid for it. Contracts or agreements are applicable to all rights, real, perſonal or mixed, which may lawfully become the ſubject of traffic.

All contracts and agreements, whether executory or executed, may be branched into the following diviſions. Firſt, contracts are either expreſs, conſtructive, or implicative. Secondly, contracts are ſimple and abſolute, or conditional. And thirdly, contracts may be written and unwriten.

1. Contracts may be ſaid to be expreſs, where each party ſtipulates in direct, poſitive and explicit terms, the thing that is to be done or omittted.

Contracts or agreements are conſtructive, where the law in expounding the inſtrument which contains the contract, raiſes a contract of a different nature, from that, which at firſt view the inſtrument imports. As a recital in articles of marriage, that whereas the defendant was to pay to the plaintiff, one thouſand pounds for the marriage portion of the wife, the plaintiff covenanted to make a certain ſettlement: here the recital of the agreement was held good, to ſupport an action of covenant. And the reaſon of this general rule is, that where perſons are agreed on a thing, and words are expreſſed or written, to make the agreement, altho they are not apt and uſual words, or whether they proceed or not, from the proper party, yet if they have ſubſtance in them, tending to the effect propoſed, and the proper party agrees to them, the law will give them effect by conſtruction, according to the intent and common uſe of ſuch words. For the law always regards the intention of the parties, and will apply the words to that which in common preſumption may be taken to be their intent; and the agreement of the minds of the parties, is the only thing the law reſpects in contracts, and therefore, ſuch words as expreſs the intent of the parties, and have ſubſtance in them, are ſufficient.

Therefore, if a man be bound in an obligation, which is indorſed,

al, that the obligee wills and grants, that if the obligor ſtands by the arbitrament, judgment, and order of certain arbitrators, then the obligation is void : it is no ground of objection, that the words are the words of the obligee and not of the obligor, but the condition is good : for there is the ſubſtance of a condition, and the intent of the parties appears.

Implicative contracts are ſuch as do not ariſe from the ſpecial agreement of the parties, but ariſe by the operation of law, out of the circumſtances of the caſe. As where a perſon receives money to my uſe, or to deliver it over to me, he is chargeable as a receiver, and the law implies a contract, that he will pay it over to me. So where a man has by any means the cuſtody of the goods of another, the law implies a contract by which he is bound to take care of them, according to the nature of his bailment. If a man deliver ſtuff, or other wares to another man's wife, knowing her to be married, without the huſband's privity or allowance, it is a gift to the wife, and the huſband is not chargeable. So the law implies an agreement, that the grantee of one thing, ſhall have every other thing neceſſary to the full enjoyment of what is granted.

2. * Contracts and agreements, are ſimple and abſolute, or conditional.

A contract or agreement, is ſaid to be ſimple and abſolute, where one party obliges himſelf poſitively and without condition, to the performance of a certain thing, which the other party may require to be carried into effect. As if a man in conſideration of a certain ſum of money paid in hand promiſes to build me a houſe by a certain day, this is an abſolute contract, and I may ſuſtain an action upon it if violated.

A conditional agreement, is where the obligation is in ſome reſpect made to depend upon ſome particular and uncertain event, or at leaſt an event uncertain at the time, in the minds of the contracting parties.

As if a man agree to give another a thouſand pounds, if he

* 1 Pow. Con. 258

marry his daughter, here the obligation is ſuſpended, till the event ſtipulated, takes effect, and if it does not happen, diſannuls it.

y Conditions may be ſaid to be lawful and unlawful. *z* The effect of unlawful conditions vary according to the nature of the contract, and the condition. If a man be bound in a bond upon condition, that he do an unlawful act, the bond is void. But if I deliver a man property, to be his, upon condition that he do an unlawful act, the eſtate is abſolute and the condition void. In both inſtances, the law aims at the ſame object, namely, the preventing the crime. In the former caſe, leſt the obligee ſhould have any temptation to commit the crime, the law frees him from the penalty of the bond; and in the latter caſe, veſts in him the property without performing the condition.

a All conditions repugnant to the nature of the contract, are void. If a man ſells another land, upon condition that he ſhall not alien, or take the profits, the condition is repugnant and void. But a covenant or bond, upon the ſame condition, will not be void; becauſe this is not a total reſtraint of alienation, or taking the profits: and therefore he has the property of the land, tho liable to incur a forfeiture of the covenant, but in the other caſe, he cannnot be ſaid to take the eſtate.

Lawful conditions may be either poſſible or impoſſible.—Poſſible conditions, are ſuch as accompliſh the contracts, that depend on them, as if I agree with the bailee of my property, that on paying me a certain ſum, the property ſhall veſt in him, or ſuch as diſſolve a bargain, as if a leaſe be made with a condition to be void, if the leſſee under let, become bankrupt, or the like, or ſuch as alter the contract, as if one agree, that if ſix per cent. (being the intereſt due on a mortgage) be paid in three months after it became due, the intereſt ſhall abate to five per cent.

b Impoſſible conditions may be divided into ſuch as are ſo, at the time of making the contract, and ſuch as become ſo, by ſubſequent matter: and ſuch impoſſible conditions have different effects on contracts. For inſtance, if a condition poſſible at the time of making thereof, but becoming impoſſible by the act of God, be annexed

y 1 Powell, 261. *z* Co Lit. 206. *a* Cro Jac. 556. *b* Co. Lit. 206. 1 Powell on contracts 263.

nexed to a contract executed, as the delivery of a horſe or the like, the right of ſuch perſon in the horſe ſhall not be avoided thereby: as if a man deliver another a horſe to be his, on condition that the perſon to whom it is given ſhall perform ſome perſonal ſervice for the giver: yet if he die, ſo that it become impoſſible by the act of God, to perform the ſervice, the property of the horſe becomes abſolute. But if ſuch condition be annexed to an executory contract, as if there be a bond of recognizance or the like, with condition, that the obligor ſhall appear the next term in ſuch a court, if before ſuch day, the obligor die, the recognizance or obligation is ſaved. And the reaſon of this diverſity is, becauſe the property in the horſe veſted by the contract executed, and could not be defeated, unleſs by ſome ſubſequent matter. But the bond or recognizance is a thing in action and executory, whereof no advantage can be taken, until there be a default in the obligor. And therefore in all caſes, where the condition of a bond, or recognizance, is poſſible at the time of making the condition, and before the ſame can be performed, the condition becomes impoſſible by the act of God, or the law, the obligation is ſaved. But if the condition be impoſſible at the time of making the obligation, the condition is void, and the obligation is ſingle, and ſtands good. As if the condition ſhould be, that the obligor ſhould go a hundred miles in ten minutes, it is impoſſible and void, and the obligation binding.

[c] But a diſtinction is made upon bonds, recognizances, and executory contracts, where the impoſſible condition is part of, and incorporated with the bond, recognizance or contract, and where it is indorſed or underwritten, for in the former caſe, the inſtrument becomes void, but in the latter caſe the conditions become void, and the obligation or contract is good.

[d] We muſt diſtinguiſh between conditions annexed to contracts and agreements, circumſtances annexed, which ſeem to import conditions, that which are modal only, neither diſannulling, ſuſpending, or altering the obligations of them, but only reſpecting the manner of performance: as that an agreement ſhall be performed on a certain day, or in a certain place. Thus if two

c 1 Salk. 172. d 1 Powell, 267,

perſons enter into a contract for the ſale of an eſtate, and the conveyances are agreed to be made, and the purchaſe money paid at ſuch a place and time. The obligation of the agreement, binds the parties, from the moment it is entered into, and the time and place are only circumſtances that affect the performance, of the engagement. Such ſtatements do not imply conditions, whereby the parties are to be conſidered as contracting on the ground of a ſtrict compliance, but are mere circumſtances that admit of compenſation, and if either party fails to comply, an action will lie againſt him, for the recovery of damages.

3. Contracts are written or unwritten. Written contracts are rendered neceſſary in certain caſes by the ſtatute of frauds and perjuries—but this ſubject will be fully inveſtigated in ſo me future part of our enquiries.

5. Of the conſideration of Contracts.

e A conſideration is the material cauſe of a contract or agreement, or that in expectation of which, each party is induced to give his aſſent, to what is ſtipulated reciprocally between both parties. It is a general rule, in all caſes where the contracts are reduced to writing, they are executed with ſuch ſolemnity and deliberation, that a ſufficient conſideration ſhall always be preſumed, and in an action upon a written contract, there ſhall be no enquiry at law, into the conſideration of it, becauſe it is ſufficient to ſay that ſuch was the will of the party contracting. It is clearly agreed at common law, that bonds and all inſtruments under hand and ſeal, are concluſive upon the parties, they cannot plead a want of conſideration, and no enquiry can be had into the conſideration. *f* Sir William Blackſtone, in his commentaries on the laws of England, lays down the ſame doctrine, in reſpect of notes of hand. *g* This doctrine is controverted by Mr. Powell, in his eſſay on contracts. He aſſerts, that while the note is confined to the parties, who fabricated it, the want of a conſideration, is a clear bar againſt a recovery upon it, on the ground of its being a nude pact, or naked agreement: and that the law prohibits no enquiry into the conſideration, till it has been negotiated, and third perſons have

e 1 Powell, 230. *f* 2 Black. Com. 446. *g* 1 Powell, 346.

have become intereſted in it. But as by our law, promiſſory notes are deemed ſpecialties, and of as high a nature, as bonds under hand and ſeal, there can be no doubt, but that the ſufficiency of the conſideration is as evident in a note of hand, as in a bond: and the party ſhall not be allowed to deny what he has acknowledged by his own deed. The principle adopted by our law, reſpecting notes of hand, clearly deſtroys all diſtinction between ſealed and unſealed contracts: and therefore it may be conſidered as a neceſſary conſequence, that it is not the ſealing, but the writing of the contract that ſtamps upon it the ſolemnity, which precludes an enquiry into the conſideration. Upon the ſame principle, therefore, all other written contracts ſhall be deemed concluſive on the parties, without enquiring into their conſideration.

z But tho the law admits no enquiry reſpecting the conſideration of contracts, reduced to writing, on the principle, that no conſideration is neceſſary to ſubſtantiate ſuch contracts, yet when the actual conſideration of a written contract, was againſt law, by which it was rendered void, the law will admit the party to prove ſuch illegal conſideration for the purpoſe of avoiding the contract.—Thus, if I execute a bond or note, to a perſon for a conſideration, that he commits ſome crime, the bond is void, and courts of law will ſo far look into the conſideration of bonds, or notes, as to allow the party, to ſet up ſuch illegal conſideration to avoid the note.

So if there be a fraud in obtaining a note, without conſideration, it is void. *i* As where a perſon gave a note with another, as ſurety for his debt, and the promiſſee cut off the name of the actual debtor, and then by affirming, that the note was not diſcharged or paid, obtained a new note of the ſurety, upon the promiſe to deliver up to him the firſt note, and then delivered it to him, with the name of the debtor cut off. For this fraud, the note was conſidered void, and no recovery was had.

j But in all caſes of unwritten contracts, it is neceſſary that a conſideration exiſt: for as words are frequently ſpoken by men unadviſedly, and without due deliberation, the law will not bind a man to an executory contract, entered into by words only, if it be

h 1 Black. Rep. 445. *i* Reynolds vs. Bird, S. C. 1791. *j* 2 Powell, Con. 330.

be not founded on good and valuable conſideration. Therefore if a man buy of me a horſe or other thing, for money, and no money be paid nor earneſt given, nor day ſet for payment, nor the thing delivered, here no action lies for the thing ſold, or for the money, but the owner may ſell it to another if he will, for ſuch promiſes or contracts are conſidered as nude pacts, there being no conſideration, or cauſe for them, and it is a rule of the Roman law, of the common law, and of common ſenſe, [k] that from a nude pact, or naked agreement, no action ariſes.

[l] I ſhall conſider what conſiderations are ſufficient to ſupport contracts. And firſt, a conſideration may ariſe from ſome act to be done by one party, for the benefit of the other; and any thing however trifling to be done by the plaintiff, will be a conſideration ſufficient to maintain an action: and ſecondly, a conſideration may ariſe, or be created, by doing or permitting ſomething to be done, to the prejudice or loſs of one of the parties. So that it is not abſolutely neceſſary, that the conſideration of the contract, imports ſome gain to him, that makes the contract: but it is ſufficient, that the party in whoſe favour the contract is made, foregoes ſome advantage or benefit, which he might otherwiſe have taken or had, or ſuffers ſome loſs in conſequence of placing a confidence in another's undertaking. Thus, if a carpenter promiſe to repair my houſe before a certain day, and he does not do it, in conſequence of which, my houſe falls, I may have an action againſt him for the damages.

[m] If a conſideration is executed, and does not go along with the contract, but is entirely paſt, and the contract merely ſubſequent, it is not a good conſideration. As a promiſe to pay a certain ſum, or do a certain thing, in conſideration that a perſon had built a houſe, or diſcharged a treſpaſs, is not good, becauſe it appears that the conſideration is perfectly paſt, and no incident thereto, to continue it: ſo a promiſe to indemnify a perſon who had bailed my ſervant, is void. But where the conſideration of a contract is executed, yet if there be an exiſting duty, it is valid. As if I am indebted to a perſon for building a houſe, or for damage done by treſpaſs, or if a perſon bailed my ſervant at my requeſt, then the exiſting

[k] Ex nudo pacto non oritur actio. [l] 1 Powell, 343. [m] Ibid. 378.

exiſting duty validates the conſideration of the contract. So if the conſideration ariſe from a prior moral obligation, as a promiſe to pay a debt barred by the ſtatute of limitations, or contracted during minority, this is a good conſideration, and is not a nude pact.

The law does not require that the quantum of conſideration ſhall be mutually equivalent: but there muſt be a ſomething, for a ſomething, and any advantage or loſs, however trifling, will ſubſtantiate a contract at law: but idle, and inſignificant conſiderations, are looked upon, as none at all; for whenever a perſon promiſes without a benefit ariſing to the promiſſor, or loſs to the promiſſee, it is conſidered as a void promiſe.

[n] In executory contracts, if the agreement be that one ſhall do a certain act, and that the other ſhall pay him a certain ſum of money therefor; here, tho the conſiderations be mutual, yet one is to be performed before the other, and therefore the act to be done, is conſidered as a condition precedent, and the party who is to pay, is not liable to an action, till the thing contracted to be performed, is done. [o] But if a day be appointed for the payment, and the day is to come before the thing can be performed, an action will lie for the money before the thing be done; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. Where a day certain is appointed for the payment, after the thing is to be performed, the performance is a condition precedent, and muſt be averred in an action for the money; for every bargain ought to be performed according to the intent of the parties, and when one relies upon his remedy, it is juſt that he ſhould be left to it, according to his agreement: but there is no reaſon that a man ſhould be obliged to truſt another, contrary to his intention: and therefore if two men ſhould agree, one that the other ſhould have his horſe, the other that he would pay ten pounds for him, no action will lie for the money, till the horſe be delivered.

[p] But when the conſiderations are mutual, and the promiſes ſeparate; as if another, in conſideration that I promiſe to do a certain thing promiſes to do another thing for me, or to pay me money at a certain day; here I need not allledge that I had performed

[n] 3 Salk. 95. [o] Jones 214. [p] Hob. 88.

formed what I had promiſed, but I may have an action againſt him, for his not performing his promiſe to me, becauſe the conſideration, and foundation of his promiſe to me, was the promiſe I made to him; it is promiſe for promiſe, and that is the conſideration, and not the performance, and each party has a right of action againſt the other for non-performance. And it is a general rule, that when the defendant has a remedy for the conſideration of a promiſe, that conſideration need not be averred to be performed. So if one covenants to marry another's daughter, and he covenants to give him one hundred pounds, either party may bring an action againſt the other, without averment of a performance on his part. *p* But mutual promiſes muſt be both binding, as well on one ſide, as the other, and both made at the ſame time, or elſe they will be naked agreements: but to this rule there is an exception in the caſe of minors, for theſe where there are mutual promiſes, tho the minor be not bound, yet the adult is.

A valuable conſideration to ſupport a contract, is work done, money paid, marriage or the like. A good conſideration is that of blood or natural affection, between near relations, the ſatisfaction accruing, from which the law eſteems an equivalent for whatever benefit may move from one relation to another. *q* The common law in ſome caſes conſiders the intruſting a thing with another, and his undertaking reſpecting it as a conſideration in itſelf, for a faithful diſcharge of the truſt: and therefore tho an action will not lie, for not doing a thing where there is no conſideration to uphold a contract, to do it, yet where there is a delivery of goods to a perſon, who undertakes to carry them, or do ſomething about them gratis, an action will lie on this bailment, if there be a neglect in the management, by which the goods are ſpoiled. So if I promiſe another to keep certain goods ſafely, till ſuch a time, and afterwards refuſe to receive them, no action lies: but if I take them, and they are afterwards loſt or injured by my negligent keeping, an action lies.

6. Of the interpretation or conſtruction of contracts.

r Conſtruction, is the drawing an inference by the aid of reaſon, as

p Salk. 31. *q* 1 Powell, 364. Ld. Raym. 909. *r* 1 Powell, 370.

as to the intent of an inſtrument, from given circumſtances, upon principles deduced from men's general motives, conduct and actions. The intent of the parties, is to be gathered from the external ſigns and actions. For no man may put a conſtruction upon his words contrary to the common underſtanding. Therefore he who has an obligation in his favour, has a right to compel him, from whom it is due, to perform it in that ſenſe, which correſponds to the ordinary interpretation of the ſigns made uſe of.

In the caſe of expreſs words, the general rule is, that they muſt be underſtood in the moſt known and proper ſignification, unleſs there be the moſt deciſive reaſons which lead to conjecture the intent was otherwiſe. We are not merely to regard the grammatical conſtruction, which relates to the etymology and original of words; but that which is common and moſt in uſe; for uſe is the judge, the law, and the rule of ſpeech.

Where words uſed in a contract expreſſive of quantity, or the like, have different ſignifications, in different places, they will take effect as they are underſtood, where they are ſpoken — Where words are equivocal, or ſentences ambiguous, and capable of ſeveral ſignifications, conjectures are neceſſarily reſorted to, for the purpoſe of diſcovering the genuine intent of the parties: and in ſearching for ſuch intent, our conjectures muſt be guided by the ſubject of the contract, the effects reſulting from it, and the circumſtances attending it. But where the obſcurity and ambiguity of the terms of a contract, cannot be cleared up by the intentions of the parties, diſcoverable by the rules of expoſition, then the conſtruction ought to be againſt him, who ought to have explained it himſelf, or made the other have delivered himſelf fully. And therefore, he in whoſe favour the obligation is, ought to ſpeak clearly, or otherwiſe, the other party has a right to explain the clauſe to his own advantage. But where the intent of the parties cannot be aſcertained by the ſigns they uſe, or the contract is inexplicable, or uncertain, it is void.

In all contracts and agreement, the executors of the contracting parties, are implied in themſelves, and without naming, if

from the nature of the contract, it appear that the parties ſo intended.

If money is to be paid by reaſon of a contract, the terms ſhall be underſtood and accepted, according to their import, where it is to be received; that is, it ſhall be paid in currency there. So if a man advance money by way of loan, or if another detain his money unlawfully, by reaſon of which, he becomes entitled to intereſt, that intereſt ſhould be according to the value of forbearance, in the country where the tranſaction ariſes. If the value of a thing be expreſsly ſtipulated in any contract, the value of the thing ſhall be intended, as things are at the time the contract takes effect. As if rent be, to be paid at a given time, at which time, a ſhilling is of the value of twelve pence, and it afterwards become only of the value of ſix-pence, as was frequently the caſe in former times, if the money be tendered at the time, the leſſor ſhall not afterwards recover any more ſhillings, than would have paid the rent, at the rate of the money when the rent was due, and tendered. So if one be to pay on ſuch a day, five quarters of corn, and at the day the contract was made, it was valued at fifty pounds, and at the day of payment, five pounds, he would be entitled to five quarters of corn, or five pounds.

This rule has been recognized by the courts of law in this ſtate, and in all inſtances, upon actions brought upon ſome contract, for the payment of ſome collateral article, the rule has been to aſſeſs the damages, according to the current value of the article, at the time of payment. The ſame has been the rule, reſpecting notes given for any of the public ſecurities of this State or of the United States: to aſcertain the value at the time, when payable, and render judgment for that ſum. If the contract be made payable on demand, it is conſidered as due inſtantly, and the date of the contract has been the period at which to calculate the value of the ſecurities.

Several deeds made at the ſame time to effect one object, will be conſtrued as one aſſurance, but ſo that each ſhall have its diſtinct operation, to carry on the main deſign.

Hitherto

Hitherto, I have been guided in my reſearches upon contracts, by the eſſay of Mr. Powell, on that ſubject, and where it was to my purpoſe, I have tranſcribed litterally from him, without any attempt to vary his expreſſions. On mature attention, it is evident that he has fully inveſtigated and exhauſted the ſubject, and has every where expreſſed himſelf with that conciſeneſs, perſpecuity, and energy, which is to be expected from a writer of firſt rate genius. As there can be no pretention to originality in a compilation, and as the whole merit conſiſts, in detailing the ſentiments of others with fidelity and accuracy, I conſider it vain to torture the imagination, to find new expreſſions to convey the ſentiments of that writer, when his ſtile is ſo perfect and correct, that it would be idle to attempt to improve it.

7. Of the ſeveral ſpecies of contracts.

We have treated of the general principles reſpecting contracts, and come now to conſider more minutely the ſeveral ſpecies.—The ſeveral kinds of contracts, by which perſonal eſtate is transferred, are ſale and exchange: bailment: hiring and borrowing: and debt, of each of which, I ſhall treat at large.

1. [f] Sale and exchange, are the moſt uſual and general mode of tranſmitting and transferring property from one to another. This may be conſidered a contract executed, and takes inſtant effect, by the immediate delivery of the thing. The difference between a ſale and an exchange, is this, the delivery of one article of goods for another, is an exchange: and the delivery of goods for money, is a ſale: but the ſame general rules of law, govern each kind of conveyance. A ſale of perſonal eſtate, is founded on the conſideration of ſome price, that is paid for it, or the value of ſome article given for it. There muſt be ſome conſideration to conſtitute a ſale. It is not however requiſite, that the conſideration be of equal value with the thing purchaſed: for an actual conſideration, however trifling, ſubſtantiates the ſale between the parties.

It is a general rule, that the owner of things perſonal may diſpoſe of them whenever he pleaſes. And let him be ever ſo deeply involved in debt, or embarraſſed with executions, yet a bona fide purchaſer

[f] 2 Black. Com. 446.

for valuable conſideration, ſhall hold the eſtate againſt creditors. In this reſpect we differ from the Engliſh law, for there when the execution is delivered into the hands of the ſheriff, the goods of the debtor are holden to anſwer the debt, and a ſale ſhall be deemed fraudulent.

An effectual ſale and transference of perſonal property, is made when the parties have agreed on the price, payment is made and a delivery of poſſeſſion given. No ſale can be made without an actual payment or an expreſs agreement for the payment at a future time. If a man aſks ſix pounds for his horſe, and another agrees to give him that ſum, this is no ſale: but if he pay down the money, or the owner agrees to take a note, which is given, or to wait for the payment, till a future day, then the bargain is compleated and the property of the horſe transferred. Therefore, when the owner fixes on a price, and agrees that he will take that ſum, and the purchaſer agrees that he will give ſuch price, it is a bargain, and neither party can recede, provided immediate payment or delivery be offered: but if no payment or delivery be offered, and nothing further be done, the bargain is conſidered of no force and does not bind either. But when the parties have agreed on the price, and any part be paid and received as earneſt money, the contract is effectual, and the property is transferred from one and veſted in the other, and they have full power to carry the bargain into effect. One may demand the thing ſold, and the other the reſidue of the price.

It is very cuſtomary in the ſale of perſonal property, to make an actual, and formal delivery of the thing ſold, in the preſence of witneſſes called for that purpoſe. This is a prudent practice, and renders ſuch ſales evident with the cleareſt certainty, and proveable with the greateſt facility. But ſuch formal delivery of poſſeſſion is by no means neceſſary to conſtitute a conveyance. It may therefore be conſidered as a general rule, that a ſale is effectual, and valid, when the parties have agreed on the price, and the payment is actually made, or an agreement with reſpect to the payment, be made. If it be manifeſt that it is the intention of the parties to bargain, that one ſells and the other buys, it is ſufficient without any formal delivery of the poſſeſſion of the article. Thus if a man

ſells

tells me, that the price of his horſe is ten pounds, and agrees to take that ſum, and I agree to give it, or to give my note payable at a future time, and he conſents to take it, here upon my paying the money, or executing the note, the contract is effectually compleated without delivering the horſe to me. I may maintain an action againſt him for the horſe. If the horſe ſhould die after compleating the bargain, and previouſly to my taking poſſeſſion, I muſt ſuſtain the loſs; for as ſoon as the bargain is made by agreeing on the price and payment, the property is transferred from the ſeller to the buyer, and the ſeller becomes entitled to demand the price, and the purchaſer to demand the horſe. The purchaſer however muſt not take the horſe, without offering the price agreed on, and the ſeller, if he refuſes to deliver the horſe, when the price is tendered, is liable to an action. But where there is a propoſal to bargain, or where there is a mere agreement as to the price, and nothing further is done, the bargain is incompleat, and either party is at liberty to do as he pleaſes.

On the ſale of goods, if earneſt money be paid by the purchaſer, or part of the goods be taken away, he muſt pay the reſidue of the money, upon taking the reſt of the goods, becauſe no other time is appointed. The earneſt money binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying, or tendering the reſidue of the money is void. When the ſeller has taken earneſt money, he cannot afterwards diſpoſe of the goods, unleſs there be ſome default in the buyer. Therefore if he does not take away the goods, and pay the money, the ſeller ought to requeſt him to do it: if he then neglects to do it, in a reaſonable time, the ſeller may conſider the bargain as diſſolved, and diſpoſe of them to whom he pleaſes, or he may tender the goods to the buyer, and demand of him the reſidue of the money. The ſeller muſt keep the goods a reaſonable time for delivery; but where there is no time appointed for the payment of the money, or delivery of the goods, it is generally implied, that the delivery ſhall be made immediately, and the payment on the delivery.

No perſon can diſpoſe of perſonal eſtate, unleſs he be the owner, or be thereto authoriſed by the owner. Thus, if a man either

either lawfully or unlawfully gain the poſſeſſion of my eſtate, he cannot by any ſale diveſt me of it, without my conſent. Thus, if I lend or hire my horſe to a man to ride, or truſt him in his poſſeſſion to paſture, he cannot diſpoſe of the horſe, nor is he liable to be taken for his debts. If a man ſteal or tortiouſly take my horſe, he cannot ſell him, but I have a right to take him wherever I can find him. If he ſhould paſs through ſundry hands, I have a right to demand him of the poſſeſſor, and if he refuſes to deliver him up, I can maintain an action againſt him, and ſo I may againſt any of the perſons through whoſe hands he has paſſed, however honeſt they may be : and the perſon of whom I recover, if an honeſt purchaſer, muſt look to him of whom he purchaſed for his recompence ; for the law will not ſuffer any man's property to be tranſferred without his conſent. The purchaſer therefore, muſt take care, that the perſon of whom he buys, be the lawful owner, for if he be not, he muſt riſque the conſequence. Therefore, if I lend the uſe of my property to a poor neighbor, for an honeſt purpoſe, I am ſecured by law againſt his ſelling it. But if a perſon will truſt his property in the hands of a bankrupt, for the purpoſe of enabling him to cheat and defraud, he ſhall be concluded by the act of the bankrupt. If the owner be preſent, and ſees another diſpoſe of his eſtate, without informing the buyer, ſuch ſilence ſhall be conſtrued to be a tacit acquieſcence in the ſale. But if he be not preſent or knowing to ſuch ſale, he is not bound by it. In all caſes, it is prudent and reaſonable for the owner of the property, if he is acquainted with the tranſaction, to forbid it and make known his claim ; eſpecially where an officer levies an execution upon the eſtate of one man, as belonging to another, ſo as to prevent any preſumption or implication of conſent. If a man ſuffer another to have the cuſtody of his property, as a horſe for example, and permit him to make ſale, and the purchaſer for ſome time has him publicly, without any claim from the ortginal owner, this ſhall be deemed an aſſent to the bargain, and he ſhall be precluded from making any demand of the horſe from the purchaſer. In England the ſale of things in fairs, and markets overt, bind the wner, but here the law is otherwiſe.

All

t All ſales of perſonal as well as real eſtate, made with an intent to defraud creditors, are void as to them, by the common law, as well as by ſtatute. *u* It has been determined, that where a man in failing circumſtances, makes over his property to one of his creditors, to pay his debts and return the ſurplus it is putting his eſtate out of the reach of legal proceſs and taking it out of the management of the law, and is a fraud.

w A fraudulent conveyance or gift, to deceive or defraud one creditor is void againſt all: but fraudulent conveyances, can never be conſtrued, to be fraudulent, only with reſpect to real creditors, and purchaſers for a valuable conſideration, but ſhall bind the parties and their repreſentatives.

As fraudulent ſales are uſually conducted in ſuch a manner, as to render it difficult to obtain expreſs and direct proof, courts have been obliged to admit certain preſumptions, to detect ſuch dishoneſt tranſactions.

x The characters or badges of fraud in ſales and conveyances, are, 1. Where the conveyance is general comprehending all a man's eſtate, without exception, which cannot be preſumed to take place, without a good underſtanding, that the ſeller ſhall have ſome part of his ſupport. 2. Where the ſeller remains in poſſeſſion, for this is the beſt evidence of property. 3. Where there was a ſecret manner of tranſacting the ſale, with unuſual clauſes in the conveyance, as that it was made honeſtly and truly, which artful appearances are marks of colluſion and fraud. 4. Where there is a ſecret truſt between the parties, to permit the ſeller to uſe or have ſome advantage of the goods.

2. Of bailment. *y* This is defined to be a delivery of goods upon truſt, to another perſon, to keep for certain purpoſes; being ſometimes for the uſe of the bailor, ſometimes for the uſe of the bailee, and ſometimes for a third perſon. Bailment is in all caſes, where goods are to be delivered into the hands of another, without transferring the property, and the law always implies a contract, that the bailee will take care of them according to the nature of the bailment. There are ſix kinds of bailment, which I ſhall conſider

t 3 Co. 83. Co. Lit. 290. Statutes 87. *u* Franklin, vs Lavalee, S. C. 1793. *w* 5 Co. 60. Cro. Jac. 270. *x* 3 Co. 81. Mood. 619. *y* 2 Bacon Com. 451.

conſider ſeparately, for the purpoſe of underſtanding the ſubject clearly, firſt remarking, that the law reſpecting bailments is principally derived from the Roman juriſprudence.

z A bare naked bailment of goods, is where they are delivered by one man to another to keep for the uſe of the bailor. In this caſe, the law implies a contract by the bailee, that he will take ſuch care of them, as that they may not be damaged by any groſs neglect of his own. For in ſuch caſes it ſeems to be contrary to reaſon and juſtice, that where a man is to have no reward, he ſhould be charged without ſome default in him. He is not therefore bound to do every thing he is capable of, but if he keeps the the goods with an ordinary care, he performs his truſt. And even if he keeps the goods bailed to him, as he keeps his own, it is evidence that he has diſcharged his undertaking: and therefore in ſuch caſes, if he keeps his own negligently, yet if he keeps the other in the ſame manner, he is not chargeable. As if the bailee be known, as an idle, drunken, carleſs fellow, and come home drunk and leave open all his doors, by which the goods are ſtolen, yet he ſhall not be charged, becauſe it was the bailor's own folly, to truſt ſuch perſon.

2. a The ſecond kind of bailment, is where uſeful goods are ent to a friend, to be uſed gratis, and be reſtored in ſpecie. In this caſe the law implies, that the borrower contracts to uſe the ſtricteſt care and diligence to keep the goods, ſo as to reſtore them back again ſafe to the lender, becauſe the bailee has a benefit by the uſe of them, and if he be guilty of the leaſt neglect, he will be anſwerable. As if a man lend another his horſe to go weſtward, or for a month, and he goes northward, or keeps the horſe more than a month, he is liable for any accident that befalls him, on the northern journey, or after the expiration of a month; for he has made uſe of the horſe contrary to the truſt, and it may be, if the horſe had been uſed no otherwiſe, than he was lent, the accident would not have befallen him. But the bailee is never anſwerable for any accident that befalls things bailed to him, while he is uſing it according to the bailment, and is guilty of no neglect. Therefore if a horſe bailed as aforeſaid, ſhould be ſtolen from the ſtable of the

z Lord Raymond, 913. a Ibid.

the bailee, where he was properly ſecured, he would not be liable: but if the ſtable doors be left open, he ſhall be anſwerable for the neglect. For he ought to take the utmoſt care, but in no caſe ſhall he be charged where there is no default in him.

3 *b* The third kind of bailment is where goods are delivered to the bailee, to be uſed by him for hire, and reſtored in ſpecie. He is bound to take the utmoſt care and return the goods at the expiration of the time for which they were hired: but ſhall not be charged without being guilty of ſome neglect. Much of the intercourſe among mankind is carried on in this way, and the hirer muſt pay ſuch price as is ſtipulated, or what it is reaſonably worth, if no expreſs ſtipulation be made.

4 *c* The fourth kind of bailment is where goods are delivered as a pawn, to be ſecurity for money borrowed. The creditor who takes the pawn is bound to reſtore it on payment of the debt, and if he uſes due diligence, and reaſonable care in keeping them, he will be indemnified againſt any loſs; and if they are loſt without his neglect he may reſort to the pawner for his debt. If the pawn-broker be at charge in keeping the goods, as if it be a horſe, and he provides hay for it, he may uſe it for his reaſonable charge. But if the money be tendered, before the goods are loſt, the pawnee ſhall be anſwerable for them, becauſe by detaining them after tendry of the money, he is a wrong doer, and muſt in all events be anſwerable for the loſs.

5 *d* The fifth kind of bailment is where goooods are delivered to be carried, or ſome thing to be done with them, by the bailee for a reward, to be paid by the bailor. If they are delivered to a common carrier, and he is to have a reward, the law implies a contract to anſwer for the goods, at all events, excepting the acts of God, or the enemy of the ſtate: for otherwiſe carriers who are truſted with things of great value, would be under a temptation to confederate with thieves. But if they are delivered to a private perſon, tho he has a reward, yet he is only to do the beſt he can, and while he is guilty of no neglect, he is reſponſible for no accident, or misfortune.

b Ld. Raym. 913. *c* Ibid. 917. *d* Ibid. 913.

6. [a] The ſixth ſort of bailment, is the delivery of goods to a perſon, who is to carry them or do ſomething about them gratis, and without receiving any reward for ſuch work or carrying. This is an action by commiſſion, and if the bailee behaves negligently he is anſwerable, but the contract muſt depend upon the nature of the engagement, whether it be general or ſpecial. A general undertaking only implies a contract againſt groſs neglects; and therefore if one undertake to carry brandy for another, and miſchief be done by ſome perſon meeting the cart, or if a drunken man come by in the ſtreet, and pierce the caſk, the bailee is not liable and for this reaſon becauſe he is to have nothing for his pains: but if the accident happen by his neglect he is anſwerable. But if a man undertake expreſsly to do ſuch an act ſafely, and ſecurely, if the thing come to any damage by his miſcarriage, the law implies a contract, that he will be anſwerable; for this reaſon, that he undertakes the taſk, and is intruſted on theſe terms.

In all theſe inſtances a ſpecial qualified property is transferred by the bailor to the bailee, together with the poſſeſſion. The bailor therefore is conſidered as having the general property; becauſe he has a contract for its reſtitution, and the ſpecial property is in the bailee. Either can maintain an action for any injury done to ſuch property, while in poſſeſſion of the bailee. The bailor becauſe he has the ultimate property, and the bailee becauſe he is reſponſible to the bailor. But a recovery by one will bar the action of the other. The bailee has no power to transfer the property entruſted to him, without the conſent of the bailor.

3. Of hiring and borrowing: and here I ſpeak only of that kind of hiring, and borrowing, by which the property of the thing is transferred, and the hirer, or borrower is not bound to return the ſame thing hired, or borrowed, but another of the ſame nature. Where the identical thing muſt be reſtored, I have conſidered under the head of bailment. All the difference between hiring, and borrowing is, that in the firſt, reſtoration muſt be made of a ſimilar thing, to that which is borrowed, with compenſation for the uſe, and

[a] L. Raym. 913

and in the laſt, the reſtoration is without compenſation: but in both inſtances the property is transferred from the perſon that lends or lets, to the borrower or hirer.

In all inſtances of hiring, where a ſpecific reſtitution is to be made, the law leaves it to the party hiring, to ſtipulate for ſuch reward, for the uſe of the thing as he pleaſes. It is left to the freedom of mankind to contract reſpecting the ſum, to be paid for the uſe of a horſe, oxen, and any article of huſbandry, as much as it is, to fix upon a price to be given for horſes, oxen, or the like. But when we take into conſideration money, or any articles whatever, loaned by one perſon to another, to be repaid in money, or articles of like kind, by which a debt is contracted, the law has limited the premium to be allowed for the uſe. Therefore when I let or loan to a perſon money, wheat, or any article, or commodity whatever, to be repaid at a future time, I muſt confine myſelf within the limits of the law, reſpecting the compenſation I am to receive. So in all inſtances where a man is indebted to me, and it is agreed to delay the payment, and he agrees to allow me a recompenſe for the delay, I cannot exceed the intereſt limited by law.

The loaning of money for intereſt, is now become ſo univerſal, and common a practice, that we can hardly ſuppoſe that there ever was a period when it was deemed repugnant to morality, or religion. Yet from a rule in the law of Moſes inhibiting the Jews from lending on uſury, or for intereſt to their own nation, tho it expreſsly permitted it to be done to a ſtranger, and from an opinion of Ariſtotle that money was barren, and that therefore intereſt for it was contrary to the nature of it, we find that the Roman cannoniſts prohibited the taking of intereſt. But this is not the only inſtance in which the church of Rome, interdicted as ſins, the moſt innocent tranſactions, while they indulged for a trifling reward, the moſt enormous crimes. The conſequence of this impolitic reſtriction, was to throw the buſineſs of lending on intereſt, into the hands of the Jews, who did not pay a conſcientious regard to the cannon law: and the danger to which they were expoſed, obliged them to reſort to the

real practice of uſury for their indemnification. So that the regulation which was intended to prevent uſury, gave birth to thoſe practices which are really detrimental to the community, and deterred mankind from loaning money at that moderate rate of intereſt, which is conſiſtent with the public welfare. The taking of intereſt was allowed by the Roman law, which as far as it reſpects property, is founded on the cleareſt reaſon and juſtice.

The ſtatute law of this ſtate, has eſtabliſhed the rate of intereſt in all caſes at ſix per cent. for a year. In the computation of intereſt on a debt, intereſt upon intereſt is never allowed.—Where ſundry payments have been made upon a debt carrying intereſt, the courts of law have eſtabliſhed the following rule. Compute the intereſt to the time of the firſt payment, if that be one year or more, from the time the intereſt commenced, add it to the principal, and deduct the payment from the ſum total. If there be after payments made, compute the intereſt on the balance due, to the next payment, and then deduct the payment as above, and in like manner, from one payment to another till all the payments are abſorbed, provided the time between one payment and another, be one year or more: but if any payment be made before one year's intereſt has accrued, then compute the intereſt on the principal ſum due on the obligation, for one year, add it to the principal, and compute the intereſt on the ſum paid from the time it was paid up to the end of the year, add it to the ſum paid, and deduct that ſum from the principal and intereſt, added as above. If any payments be made of a leſs ſum than the intereſt ariſen at the time of ſuch payment, no intereſt is to be computed, but only on the principal ſum for any period.

This rule was adopted, and eſtabliſhed in the year 1784. Previouſly to that time, the following mode of computation had been in practice in ſome parts of the ſtate. To compute the intereſt from the time it commenced to the time propoſed, and add it to the principal ſum, compute the intereſt on each payment from the time they were made, till the time propoſed, add each payment and intereſt together, and deduct from the debt. By this laſt mode, it is apparent that every payment applies directly upon the principal ſum of the debt, and none to the intereſt, till after the princi-

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pal is diſcharged—and the conſequence is, that if a man loan another a ſum of money and receive and indorſe the amount of the intereſt annually, if this mode of computing intereſt be adopted, the whole debt comprehending principal and intereſt, would be diſcharged in twenty five years. But by the mode now in force, this injuſtice is remedied by the application of payments in the firſt inſtance to the intereſt, and not to the principal, unleſs they ſurmount the intereſt: and as no intereſt is ever to be caſt upon intereſt, it ſteers clear of compound intereſt, which the law will not permit. This mode would be unexceptionable, were it not, that in computing intereſt on obligations, on which many payments have been made, and on obligations on which no payments have been made, a very different and unequal meaſure of juſtice is meted out to the reſpective debtors. For where no payments have been made, ſimple intereſt only is computed: where many payments have been made, compound intereſt comparatively ſpeaking, is computed, and the conſequence is, that two debts of equal magnitude, let them be on intereſt for a number of years, let one make frequent payments and the other none, and compute the intereſt by this rule to a certain time, and we ſhall find, that the perſon who has made the payments, muſt eventually have a conſiderable larger ſum to pay, taking in all his payments, during the period propoſed, than he who has not made any payment. The debtor who makes the greateſt efforts to be punctual, pays compound intereſt, and the moſt negligent debtor goes clear with ſimple intereſt.

The old mode of calculating intereſt is ſo manifeſtly unjuſt, that no perſon can wiſh to ſee it reſtored. The inequality of the preſent mode is ſo great, as to require to be remedied. Any mode which at a given rate per cent. ſhall operate equally in all caſes, muſt be acknowledged to be juſt and right. Compound intereſt is the only poſſible mode that can be adopted, that will have this operation. By that rule, we ſhall find that no difference will eventually be made between them, who make frequent payments on their obligations and thoſe who make none: and by the ſame rule, all payments will firſt be applied to the intereſt. No reaſonable objection can be made againſt compound intereſt. At the end of a year,

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it is manifeſt that the intereſt is as much due to the creditor, as the principal. If payment be delayed, intereſt ought to be computed upon the one as much as upon the other. As this is the only fair, juſt, and equal mode of computing intereſt, I preſume that the period is not diſtant, when mankind will ceaſe to be frightened by words, and compound intereſt be eſtabliſhed by law.

Our courts formerly adopted very narrow principles with reſpect to the allowance of intereſt on debts, rarely allowing it, unleſs there was an expreſs contract to pay it. I have known them refuſe to allow it on proteſted orders; in actions for money had and received: and in actions of debt on judgment: but of late, more liberal and equitable principles have been adopted. They have allowed intereſt on actions for money had and received. *f* And in one caſe upon a note without intereſt, after the day of payment had elapſed. The juſt rules of allowing intereſt are very plain. It ought to be computed on all debts where there is an expreſs or implied contract to pay it, and in all caſes, where in juſtice and good conſcience it ought to be paid, or where there has been an unreaſonable delay of payment of the principal debt, it ought to be allowed by way of damages.

The principle by which the rate of intereſt on money loaned, is determined, depends on a calculation of the quantity in circulation, and the goodneſs of the ſecurity. If money be exceeding plenty, intereſt will be low in proportion. This has been exemplified in Europe ſince the diſcovery of America. The immenſe quantities of gold and ſilver imported into Europe, encreaſed the price of things, and lowered the rate of intereſt. If the ſecurity for the money be undoubted, and there be no hazard of loſs, the intereſt ought to be proportionably low: ſuch are the general principles that will govern mankind reſpecting the rate of intereſt; but the legiſlature cannot make ſuch nice diſcriminations, but muſt eſtabliſh one general rule, extending to all caſes of loans. However, where from the very nature and terms of the contract, the principal ſum is put in hazard, it is not conſidered as governable by the general law, but the parties are admitted to make ſuch contracts as they pleaſe, reſpecting the premium, where the premium and principal

f Elderkin vs Dyer, Supreme Court of Errors. 1795.

principal are both at riſque. Such are the caſes of bottomry, reſpondentia, and policies of inſurance.

1. [g] Bottomry, is in the nature of a mortgage of a ſhip, where the owner hires money, and pledges the keel or bottom of the ſhip, for the repayment. If the ſhip returns, the premium agreed on muſt be paid, and the ſhip and borrower are both anſwerable; if it be loſt, then the lender loſes his money. But if the loan be not on the ſhip, but on the goods or merchandize, which muſt neceſſarily be ſold or exchanged in the courſe of the voyage, then only the borrower is bound to anſwer the contract, who is therefore ſaid to take up the money at reſpondentia.

2. [h] Policies of inſurance, are contracts made by perſons in this manner. If a perſon has a veſſel at ſea, or that is about performing a voyage, it is uſual for him to apply to ſome perſon, who is called an inſurer, who for a certain premium, will inſure againſt all loſſes. If the veſſel return ſafe, then the inſurer gains the premium. If it be loſt, then he muſt pay the ſum that was inſured. The rule to calculate the premium is, to proportion it to the hazard and danger of the voyage. This practice is much favoured by law, as it tends to diſtribute the loſſes in trade among the commercial intereſt in general, and ſaves individuals from total ruin by a ſingle loſs.

4. [i] Debts are things in action, and may be defined to be the right which one perſon has to call upon another, for a certain ſum of money; and the duty or obligation of the perſon to pay the ſum. Debts may be conſidered as reſulting from contracts expreſs or implied: as when one perſon delivers to another property, or performs for him certain ſervices, this creates an indebtedneſs from one to the other, and there is a contract expreſs or implied, to pay what the property or ſervice was reaſonably worth. Debts are of two kinds, thoſe which are evidenced by written contracts, and thoſe which depend on parol proof.—Debts which are ſupported by written evidence, are of two kinds; thoſe which are of record, and thoſe which are ſubſcribed by the party obligated.

I. 3

g 2 Black. Com. 457. h Ibid. 458 i Ibid. 465.

1. A debt of record is a ſum of money which appears to be due by the evidence of a court of record. Thus a ſum found due from one perſon to another on an action, by the judgment of a court, is a debt of record, which is the higheſt evidence of a debt.

Recognizances ackonwledged by parties in court, are debts of record. Theſe are entered into for various purpoſes. In criminal proſecutions for bailable offences, the perſon may procure bail, who enter into recognizances in preſence of the court. So perſons may acknowledge bonds of recognizance for their good behaviour. Theſe recognizances are all upon certain conditions, that the criminal appear, abide final judgment, or be of peaceable and good behaviour; and if the conditions are fulfilled, the recognizance is void, but on failure it becomes forfeited. In civil actions, bonds of recognizance may be required in certain caſes, from one party to the other. In all caſes where the plaintiff lives out of the ſtate, where the ſuit is by attachment, or the plaintiff is ſo poor, that he is unable to pay a bill of coſt, bonds for proſecution muſt be given. So where the body of the defendant is attached, he muſt give bail to abide final judgment, and in caſes of appeal, bond muſt be given to proſecute ſuch appeal. Theſe bonds are all expreſſed to be on certain conditions, which if performed, they are diſcharged, if forfeited, the damages are recoverable by them.

[k] Debts evidenced by written contracts, are further divided into thoſe which are ſigned and ſealed, as bonds, and thoſe which are unſealed, as promiſſory notes, and bills of exchange. They are further divided into debts by due ſpecialty, and debts due by ſimple contract.

In England, debts by ſpecialty, are where the ſecurity is under hand and ſeal, and debts by ſimple contract, are where the contracts are in writing unſealed or parol. But in this ſtate, the courts have adjudged, that promiſſory notes tho unſealed, are ſpecialties. Our law then is, that ſpecialties conſiſt of obligations under hand and ſeal, and of promiſſory notes: and the ſimple contract comprehends all other contracts, written and parol. The diſtinction however between ſpecialties and ſimple contracts, is not of any great importance in this ſtate, becauſe there is no preference given to

[k] 2 Black. Com. 465.

to creditors in ſuch caſes, but they all ſtand on the ſame footing. I proceed to treat of bonds, promiſſory notes, and bills of exchange, which are the uſual written contracts, that are uſed between individuals, in the ordinary negotiation of buſineſs.

1. A bond or obligation, is an inſtrument, or deed written on paper or parchment, by which the obligor, obliges himſelf, his heirs, executors, and adminiſtrators, to pay a certain ſum of money to another, at a day appointed. If this be all, the bond is called a ſimple one: but the general practice is to add a condition, that if the obligor does ſome particular act, the obligation ſhall be void, or elſe to remain in full force: as payment of rent, indemnity on any account, performance of covenants in a deed, or repayment of a principal ſum of money borrowed of the obligee, with intereſt; which principal ſum, is uſually half the peral ſum ſpecified in the bond. In caſe the condition is not performed, the bond becomes forfeited, and at common law the obligor is liable to pay the whole penal ſum; but as this is uſually much larger, than what the obligee ought in juſtice to take, our ſtatute law has enabled courts of law to take up ſuch matters in equity, and to render judgment for ſuch ſum as is due in juſtice and good conſcience.

2. Promiſſory notes, contain expreſs promiſes for value received, to pay by a certain time, a certain ſum of money, or ſome collateral thing. Wherever there is a debt certain to be ſecured, it has become the uſual practice to ſecure it by note, as the ſecurity is of a more ſimple, tho' as high a nature as bonds: and bonds are now rarely uſed, unleſs it be in contracts where it is neceſſary to provide for the performance of certain conditions.

3. Bills of exchange, are a written ſecurity, calculated for the convenience of commercial tranſactions, and may be defined to be an order, direction, or requeſt, from one perſon in favour of another, to a third perſon, deſiring him to pay a certain ſum on his account. The perſon who writes the requeſt, is called the drawer, the perſon to whom it is directed, is called the drawee, and the perſon to whom it is made payable, is called the payee.

Bills of exchange, are foreign or inland: foreign bills are drawn

by merchants reſiding abroad, upon their correſpondents or connexions at home, or by merchants at home, upon their correſpondents or connexions abroad. A bill of exchange, is deemed a thing in action, for the law implies a promiſe on the part of the drawer, that if the drawee refuſes to accept and pay the bill, that he will pay it himſelf; and therefore it is the common practice, to expreſs that a value has been received by the drawer. The drawer not being liable if the drawee pays, it is neceſſary for the payee to make application to the drawee, to preſent him the bill, and requeſt him to accept and pay it. If the drawee refuſes to accept, or accepts and neglects payment, for the term of three days, the payee muſt go before ſome notary public and procure it to be proteſted, for non-acceptance or non-payment, as the caſe may be, and within fourteen days give notice to the drawer. If there be no ſuch notary public in the place, then the proteſt may be made by ſome ſubſtantial inhabitant, in the preſence of two credible witneſſes, and then the drawer is liable to pay the bill, with all the coſts and damages. The payee muſt apply in due time to the drawee, and proceed and notify regularly, if he means to ſubject the drawer, and if he is guilty of any neglect or delay, by which the debt is loſt, he ſhall ſuſtain the loſs.

Inland bills of exchange, are drawn by perſons within the ſtate on each other. They are here known by the name of orders, and are become a very common and convenient mode of negotiation. They are dependent on the ſame general principles, as foreign bills: but as they differ in ſome reſpects, I ſhall treat of them particularly. Orders are to be drawn in preciſely the ſame form as bills of exchange, and it is uſual to expreſs a value received, which precludes any diſpute reſpecting the conſideration; but if a value received, be not expreſſed, it muſt be averred and proved in an action grounded on the order. The payee or bearer muſt in a reaſonable and convenient time apply to the drawee, preſent the order and requeſt him to accept, and pay the ſame. If the drawee refuſe to accept, or if he accept and refuſe to pay immediately, or if the payee be willing to wait a reaſonable time, and he does not make payment, then the payee muſt give notice within a reaſonable time to the drawer, of the non-acceptance, or non-payment

non-payment of the order, and then the drawer becomes liable to pay the ſame to the payee. For in all caſes the law implies a contract, that the drawer will pay the order to the payee in caſe of the refuſal or inability of the drawee. But to render the drawer, liable to pay the order on account of the inability of the drawee to pay, it behoves the payee to apply as ſoon as convenient and reaſonable in the courſe of buſineſs, to the drawee, to preſent to him the order for acceptance and payment : for in caſe of a failure, and bankruptcy of the drawee, after the drawing of the order, the drawer is not liable to pay the order, unleſs the payee has uſed due diligence, in his attempt to obtain it of the drawee ; and on failure, has given reaſonable notice to the drawer. Therefore if the payee neglects unreaſonably to preſent the order, or delays giving notice of non-acceptance, or non-payment in a reaſonable time to the drawer, ſo that it appears, if the order had been preſented in due ſeaſon to the drawee, that he would have paid it, or if reaſonable notice had been given to the drawer, that he might have called upon the drawee for the debt, then the drawer ſhall not be liable to pay the order to the payee ; becauſe the debt is loſt by the neglect of the payee. A mere acceptance of the order by the drawee will not exonerate the drawer ; but if the payment be not made in a reaſonable time, and due notice be given, the drawer is liable, but if the payee receives any part of the money on the order, or takes the ſecurity of the drawee for it, he wholly acquits and diſcharges the drawer. There is no need of a proteſt of the order by our law, to make the drawer liable. The refuſal to accept, or neglect of payment, is ſufficient to charge him, and no formal proteſt is ever made. As the law in diſcharging the drawer from any liability to pay the order to the payee, goes on the principle that there has been a failure of the drawee, and the drawer muſt loſe his demand on the drawee which is owing to the neglect of the payee, it follows of courſe, that where there has been no failure of the drawee, if the payee delays preſentment of the order, or notice of non acceptance, he ſhall not be foreclоſed of his demand upon the drawer ; becauſe no inconvenience accrues from ſuch delay to the drawer, for the ſame demand continues againſt the drawee, as well

as the ſame ability to pay. But whenever any prejudice can ariſe to the drawer by reaſon of the delay, he ſhall be exonerated from any liability, as if the demand be on the drawee by book, and the payee neglect preſenting the order, or giving notice of the refuſal till the drawer be barred by the ſtatute of limitations, he cannot be liable. So that the drawer can never be liable where there has been a delay on the part of the payee, unleſs his demand, and the ability of the drawee be ſuch, that the drawer may recover his debt.

In addition to theſe particular ſecurities, there are many other written ſecurities, which are things in action, and depend upon the general rules and principles of contracts. There are alſo an unbounded variety of verbal contracts expreſs and implied; as well as book debts, which are governable by the general principles, which cannot be here conſidered, but will be taken up in the next book and treated of with all the minuteneſs that is neceſſary.

I ſhall now proceed to make ſome obſervations, which are equally applicable to all written contracts.

1. [k] All obligations or written contracts are good tho they want a date, or have a falſe or impoſſible date, for the date is not the ſubſtance of them. The day of the delivery of an obligation is the date, when there is no day ſet forth: but if it be dated one day, and was delivered another, it is conſidered as bearing date on the day of the delivery. [l] If the plaintiff declare on a bond, or any written contract, bearing date a certain day, and does not ſay when it was delivered, this is good; for every deed ſhall be preſumed to be made, and delivered on the day it bears date, but when he has once declared on a day, he is afterwards ſtopped from ſaying that it was firſt delivered on a different, becauſe this would be a departure. [m] The plaintiff may declare on a bond, or other written contract, bearing date a certain day, and aver that it was firſt delivered on the day, when it in fact was delivered. Where the obligee declares generally on a bond of a certain date, the obligor may plead that it was firſt delivered on a different day,

but

[k] 2 Co. 5. 3 Bac. Abr. 674. [l] Cro. Eliz. 773. [m] Lev. 196.

but he muſt traverſe the delivery on the day of the date. *n* If the bond was delivered before the date, on iſſue of non eſt factum joined thereon the jury are not eſtopped to find the truth, that it was delivered before the date, and it is good from the delivery.

There are no particular formalities required by law, reſpecting the delivery of written contracts; but where they paſs from one to the other by mutual conſent, and purſuant to their intentions, they will be obligatory.

2. *o* It is an eſtabliſhed principle, that two or more perſons may be bound jointly, in any written obligation, or they may bind themſelves jointly and ſeverally. In caſe of a joint obligation, the obligee muſt ſue all the obligors, but when he has obtained execution, he may collect the money of which he pleaſes, and the reſt ſhall be accountable for their proportion to the perſon who paid. Where one of the joint obligors, die, his executor or adminiſtrator is wholly diſcharged of the debt at law, and it ſurvives againſt the ſurvivors: but in equity, if the ſurviving obligor be unable to pay, and the deceaſed obligor left a ſufficient eſtate, then ſuch eſtate ſhall be anſwerable. Where there are ſeveral perſons who are bound jointly and ſeverally in any written contract, the obligee may at his election, ſue them all jointly, or any one of them, or he may at the ſame time, bring forward ſeparate actions on the bond or ſecurity againſt each of them, and purſue them to judgment and execution. *p* But where there are more than two obligors, he cannot join two in the ſuit, he muſt join all, or ſue them all ſeparately, unleſs it appear that the other perſons are dead.

q If there are ſeveral obligors, it continues to ſurvive as the obligors die, till it wholly operates againſt the laſt obligor living, and then on his death, his executors, and adminiſtrators are only liable at law, and the right does not accrue at law againſt the executors and adminiſtrators of the others, tho it does in equity.

r If there are ſeveral obligors bound jointly and ſeverally, the obligee may ſue them all jointly or ſeverally, but if he ſues them jointly, he cannot ſue them ſeverally, for the pendency of one ſuit will abate the other. He may then collect the money of which he

n 2 Co. 4—6. *o* 2 Rol. Abr. 148. 3 Bac. Abr. 697. *p* Sid. 238. Cro. Jac. 152. *q* Bandy vs. Williams, S. C. 1793. *r* 3 P. Will. 405.

he pleaſes, but he can never make but one collection of the money, which operates as a diſcharge of the whole debt, and all the executions. *f* In caſe of joint and ſeveral obligations, if one of the obligors die, action will lie againſt his executor or adminiſtrator, and they are not diſcharged at law, as in the caſe of joint contracts.

t There may be ſeveral obligees or promiſſees, but a perſon cannot be bound to pay to two ſeverally, but ſuch obligation is void. where a bond is to pay to two perſons, or either of them, the ſeveral part is is void, and the bond is joint. If an obligation be to three, to pay money to one of them, they muſt all join in the ſuit, for they are but as one obligee, and if he to whom the money is to be paid, dies, the other muſt ſue, tho they have no intereſt in the ſum contained in the condition.

u In ſome caſes, one perſon has the power to bind another by contract, as in all caſes where a ſpecial authority is given for that purpoſe ; and in all companies and copartnerſhip, for the carrying on of commerce, according to the cuſtom of merchants and from the nature of the connexion, each one has an implied power to contract for, and bind the whole, in the ordinary courſe of buſineſs : and a note given for a company debt, by one joint-merchant in the name of himſelf and partner, or by the name and firm of the company, is good againſt all.

3. *w* It is a general rule of law, that things in action are not aſſignable : and as we have no ſtatute on the ſubject, the conſequence is, that written contracts cannot be aſſigned at law, ſo as to enable the aſſignee to bring an action in his own name, for the recovery of the debt. The aſſignee however acquires ſuch a property in the paper that contains the contract, that he may keep it, may receive the money due upon it, and may deſtroy it, and is not accountable for it to the aſſignor. But tho bonds, notes, and other written contracts, cannot be aſſigned at law, and tho the obligee is ever conſidered as the legal proprietor of the ſecurity, yet in equity, obligations are aſſignable for a valuable conſideration, and the aſſignee alone has a right to receive the money, and if the obligor after notice of the aſſignment, pay it over to the obligee, he is compellable in equity, to pay it over again to the aſſignee. The aſſignee

f 2 P. Will. 313. *t* 3 Bac. Abr. 696. *u* Kirb. 148. *w* 1 Bac. Abr. 157.

aſſignee however, muſt take all obligations, ſubject to the ſame equity, and under the ſame conditions, that it was in the hands of the obligee. The law reſpecting aſſignments will be fully conſidered in the next book of our enquires.

8. We are to conſider how Contracts are to be diſannulled, reſcinded or altered.

[x] All contracts before they are executed may be reſcinded, receded from, or waved by the concurrence of all parties, and in ſome caſes, one of the parties may reſcind the contract, as in ſales with liberty of refuſal. But where the time in which a contract is ſtipulated to be performed, is paſt, there is a perfection given it, by an action on one ſide, that renders it indiſſoluble, and it cannot be annulled; but it may be releaſed or diſcharged, for there is a difference between the diſſolution and releaſe of a contract.

[y] A releaſe may either be expreſs or tacit. An expreſs releaſe is where there is a regular acquittance or diſcharge from the contract. A tacit releaſe, is where the perſon who claims a benefit by the contract, cancels it, or deſtroys the inſtrument, by which it can be proved. A releaſe, may be parol, as where the parties [z] made a contract for the ſale of lands, and a deed was given, and a note for the payment, but before the deed was recorded, they concluded to reſcind the bargain, the deed was given up, but the perſon not having the note with him, agreed to and did diſcharge the promiſſor: on an action on the note, this was adjudged a good diſcharge.

[a] It is a general rule of law founded in reaſon, that if the perſon who derives a benefit from the fulfilment of a contract, is the occaſion why it is not carried into execution, ſuch contract is thereby annulled, and the contracting party excuſed from any obligation to perform it. If a man covenant within a certain term, to build a houſe upon the land of another, and the owner of the land forcibly prevent him from entering on the land, or prohibit him from doing it, he is diſcharged from the covenant. So if a man be bound to appear on a certain day, and before the day, the obligee caſt him into priſon, the bond is void. In ſuch caſes, the par-

ty

[x] 1 Powell, 412. [y] Ibid. 416. [z] Curtice vs. Beardſley S. C. 1792.
[a] 8 Rep. 92. Co Lit. 206.

ty bound to a performance will be in the ſame condition as if the agreement had been fulfilled by him, for if he whom it concerns to have my part of the covenant fulfilled, is the occaſion why it is not, it is the ſame thing to me as if it were fulfilled.

b A contract of a lower degree is diſcharged by accepting a contract of a higher degree for the ſame thing, as taking a bond for a book debt, but by the common law, contracts of equal degree, do not extinguiſh or determine each other. It is therefore ſaid, that the acceptance of one bond for another, does not diſcharge the firſt bond, and that a new bond does not diſcharge a judgment, but a recovery on the firſt bond will bar an action on the ſecond.

c Where the right and the obligation meet in the ſame perſon, the contract generally is thereby diſſolved, for ſince a man cannot be his own creditor and debtor, it follows, that if a man becomes repreſentative to his debtor, his action ceaſes, there being no object on whom it can attach. Therefore, if the creditor makes his debtor his executor, the debt as between them is extinguiſhed. *d* So if a man owe a debt to a ſingle woman, and marries her, the contract is diſſolved by act of law, by the union of the right and the obligation in him. But here a diſtinction is made between contracts that are to be performed during marriage, or after the death of the huſband; for if the action can accrue during marriage, it is releaſed by the marriage; but if it cannot riſe during the marriage, and is not to be performed till the death of him who made the promiſe, then it is binding. As if a man before marriage, promiſe his intended wife, to leave her worth a thouſand pound, as this contract is not to be performed during the marriage, ſo that an action can accrue to the wife in that time, it is not releaſed by the marriage.

e A man may be diſcharged from his contract by the act of God; for when a thing is preſcribed to be done, or omitted, if by the act of God, it become impoſſible, the perſon obliged ſhall not receive any prejudice, for not executing what is ſtipulated, if every thing be performed without neglect, that the parties might perform

b 1 Powell, 423. *c* Ibid. 438. *d* Ibid. 441, 442. *e* 10 Mod. 268. 1 Rep. 98.

perform: becauſe it would be unreaſonable that thoſe things which are inevitable, which no induſtry can avoid, nor policy prevent, ſhould be conſtrued to the prejudice of any perſon, in whom there is no neglect. As if a leſſee covenant to leave a wood in as good plight, as it was in at the time of the leaſe, and afterwards the trees are blown down by tempeſt, the covenant is diſcharged.

f And the law is the ſame when a thing which is due in ſpecie, ſo that it cannot be diſcharged by an equivalent, is deſtroyed without any default in the debtor, or delay in returning it. If I hire a horſe to ride, or uſe for a certain time, and within that time he dies of ſome diſorder, I am excuſed from redelivering him, for the performance being impoſſible, by the death of the horſe, the contract is diſcharged.

g But where an agreement cannot by reaſon of the act of God, be performed according to the words, the party ſhall nevertheleſs perform it, as near the intent of the agreement as he can.

h The parties to a contract or agreement, may diſcharge it by any collateral ſatisfaction, on which they ſhall agree. As a bond for a hundred pounds in money, may be diſcharged by any collateral ſatisfaction.

9th. We proceed to unfold, how contracts may be fulfilled. It may generally be remarked, that a contract is to be fulfilled, by the performance of the thing ſtipulated at the time agreed on. Under this head the law reſpecting tendries will be conſidered.

i A tender is an offer to pay a debt, or perform a duty. Wherever the right to tender is perſonal, the tender muſt be made by the party himſelf, or by ſome perſon authoriſed for that purpoſe. Where the right is not perſonal, a tender may be made by any perſon, who is privy to the party, who has the right of tendry; as the heir or executor, in caſes where the tender is not confined to the perſon only.

k A tender may be made to any perſon, who either as party or privy, has a right to the thing tendered. Of courſe, tender to an

f Palmer, 548. *g* 1 Powell, 448. Plowd. 284. *h* 7 Mod. 144. *i* 5 Bac. Abr. 1, 3, 7. Report 13. 1 Inſt. 208. *k* 5 Bac. Abr. 10. Cro. Jac. 245.

executor, or adminiſtrator is good, becauſe they are privy in repreſentation. So a tender to the aſſignee of a thing in action, is valid.

l To make a tendry valid, it is neceſſary for the perſon making it, to declare on what account it is made. It is not ſufficient for a perſon to ſay, that he is ready to pay the debt, or perform the duty, but he muſt make an actual offer to pay the one, and perform the other. Money muſt be tendered in ſuch manner, that it may be in the power of the perſon to whom it is tendered, to receive it, otherwiſe the tendry will be void. If a man ſay he is ready to tender the money, but keeps it in a bag, under his arm, it is not a good tendry: but if he make an actual offer of the money in the bag, and can prove that the ſum intended to be tendered was in the bag, it is ſufficient; for it is uſual to carry money in a bag, and it is the duty of the perſon who receives it, to tell it, and ſee if it be good. In a contract to transfer ſtock by a certain time, it is ſaid to be ſufficient to offer to transfer it, without an actual transference, if the other party be not preſent to receive it.

m All contracts for the payment of money, may be diſcharged by Spaniſh milled dollars, weighing ſeventeen pennyweights and ſix grains, at the rate of ſix ſhillings each, and other ſilver coin in proportion thereto, according to its weight and fineneſs, and by gold coin of the fineneſs of half johannes, at the rate of five ſhillings and fourpence a pennyweight, and ſo in proportion according to its weight and fineneſs.

n If a greater ſum of money be tendered than is due, it is good, for the greater contains the leſs: but the perſon to whom it is tendered, muſt take no more than is due, and if he does, he is reſponſible for it. *o* Where a tender is to be made of any ſort of goods, unleſs they are to be delivered according to ſome ſample, it ſhould be made in a middling kind of goods of the ſort. *p* If a contract be made to pay money, or any collateral article, at a certain place, a tender can only be made at ſuch place; but if no place be appointed, the general rule is, that the tendry muſt be made to the perſon, at the place where he is, if he be within the ſame dominion; but the debtor is not bound to go into a foreign country, in ſearch of

l 5 Bac. Abr. 4. 2 Lev. 209. *m* Statutes, 160. *n* Strang. 916.
o 4 Bac. Abr. 6. *p* 1 Inſt. 210.

of the creditor. If the creditor be within the United States, I preſume the tender in theſe caſes muſt be made to him in perſon. But if the goods to be delivered, are heavy, and difficult to tranſport, the debtor, if no place be appointed for their delivery, muſt apply to the creditor, and enquire of him at what place he will receive them, and then a tendry at ſuch place is good.

q In reſpect of the time of tendring, it may be obſerved, that when the contract is to pay money, deliver goods, or perform any act, at a certain day, the tender muſt be on ſuch day. So if money be to be paid, or goods delivered on or before a certain day, a tender cannot be made before the laſt day limited for the payment, or delivery.

r Where money is to be paid, or goods delivered at a certain place, on or before a certain day, the tender muſt be made at the uttermoſt convenient time on that day; for as the debtor has till that time to make the tender, it would be unreaſonable to require the attendance of the creditor, before that time; but the tender ought to be made time enough before the ſetting of the ſun, to examine and tell the money, or take account of the goods. *ſ* If both parties meet at the place at any other time, on the laſt day, beſides the uttermoſt convenient time, or upon any other day within the time limited, for the payment, or delivery, and a tender be made, it is good.

s But where payment cannot be made at the uttermoſt convenient time of the day before the ſun ſets, by reaſon of ſome circumſtance not in the power of the parties, then a tender at the uttermoſt convenient time, in which it can be made, is good. As in caſe of a contract to transfer ſtock, an offer at the uttermoſt convenient time, before the uſual hour of ſhutting the books, is valid.

u If money is to be paid, or goods delivered, at a certain place, tho no time be fixed, yet notice to the party, that payment will be made at a certain day, a tender at the uttermoſt convenient time of that day is good. Where a perſon has a right to pay money at a certain place, when he pleaſes, he muſt give notice to the creditor of the day, he will pay the money, and then a tender at the uttermoſt convenient time of the day, is good. If no time of paying mo-

q 5 Bac. Abr. 8. Plowd. 172. *r* Ibid. 5 Rep. 114. *ſ* 3 Lev. 154. Cro. Eliz. 14. *t* 5 Bac. Abr. 9. *u* 1 Inſt. 210.

ney, or delivering goods, at a certain place, be fixed, yet if the parties meet at any time at the place, a tender is good.

If no time be fixed for the payment of money, or if it be made payable on demand, the debt is inſtantly due, and the creditor need make no demand. If the contract be for the payment of ſome collateral article, and no time be fixed, or it be payable on demand, it is neceſſary that the creditor ſhould make a ſpecial demand of the debtor, for the article to be delivered, before he is bound to deliver, and if he fail to do it in a reaſonable time, then the contract is violated, and the creditor is not obliged to receive the collateral article, but may demand the money.

w Where the contract is to pay articles to a certain amount of a general deſcription, as articles of ſhop work, it is neceſſary in a plea of tendry, to point out, and of courſe in the tendry to ſet out the particular articles whereby they can be known and diſtinguiſhed from others: for if the tendry be good it is a bar to an action on the contract, and the articles veſt in the perſon to whom tendered, and they ought to be identified, that he may know what article belongs to him.

x As to the effect and conſequence of tenders, it may be laid down as generally the caſe, that where contracts are made for the delivery of goods, or the perfomance of ſome duty, a tender by one party and a refuſal to accept by the other, diſcharges the contract. As for inſtance, if I promiſe to deliver, a perſon ſo many horſes, on ſuch a day, at a certain price, and I tender them accordly, my promiſe is fulfilled, and the property of the horſes veſt in the perſon to whom they are tendered, and they are at his riſque.

In caſes of contracts for the payment of money, a tender and and refuſal diſcharge the debt, where the caſe is ſo circumſtanced that there is no remedy left to enforce the payment: but the general rule is, that upon a contract for the payment of money, a tender at the time, and refuſal, does not abſolutely diſcharge the debt: but the debtor is bound to keep the money, and if the contract carries intereſt, that will ſtop. If the creditor bring an action on the contract, the tendry may be pleaded in bar of the action. But tho the right of recovery on ſuch contract, may be ſuſpended

w Nicholas vs. Whiting, S. C. 1792. x 5 Bac. Abr. 11, 12, 13.

ſuſpended, by force of a tender, yet a ſubſequent demand of the money, and refuſal to pay it, revives the original contract with the intereſt, and then an action will lie to recover it. A tender therefore never veſts the property of the money tendered in the creditor, but the ſame remains in the perſon who tendered, and he is therefore bound to keep it, and whenever a demand is made, to pay it. If he be ſued on ſuch contract, after the tender, he muſt plead in bar of the action, not only the tender, but he muſt aver that he has been always ready to pay the money, that he ſtill is ready to pay it, and muſt offer, and produce it in court, for the purpoſe of keeping his tendry good, and avoiding a recovery on the contract. But where a debt is wholly diſcharged by a tender and refuſal, it is neceſſary to plead the tender only.

y It is a ſettled principle of law, that where a man would upon doing a previous act, have acquired a right to a debt or duty, this is as compleatly acquired, if he make a tendry of doing the previous act, and the other party refuſe to ſuffer it to be done, as if it had been actually done. Thus if a man ſhould agree with another, upon the payment of one hundred pounds to give him a leaſe of certain lands. If the money be tendered, and a refuſal to accept it and give the leaſe, an action will as well lie upon this agreement, as if the money had been actually paid and received, and then the leaſe denied. And it is to be obſerved, that every conſequence which would have followed from a tender and refuſal, will follow from being ready to tender, in caſe the perſon whoſe duty it was to be preſent at the place, where the tender was intended to have been made, neglected to be preſent.

In all contracts for the delivery of goods, if payment or tendry be not made at the time, the contract is broken, and no ſubſequent tendry of the article promiſſed can be made, but the creditor has a right to demand the money. The debtor cannot fulfil his contract but he may tender money to the amount of the value of the goods, by way of amends: which is a principle of law, introduced by our courts.

z Where the obligation is for a ſum of money to be paid in a collateral

y Bac. Abr. 14. z Seſſions vs. Ainſworth, S. C. 1792.

lateral article, the debtor may tender the money in diſcharge of it, and it will be good.

By the common law, in all contracts for money only, if the money be not tendered on the day limited for the payment, no ſubſequent tendry can be made: but the creditor, if he pleaſes may put the party to the expenſe of a ſuit, tho he offers to pay the money; and to pay the ſame ſum, which the creditor is entitled to recover by the judgment of a court of law. It muſt be very apparent to the eye of reaſon, that it is a great hardſhip and highly unjuſt, that when the parties know the ſum, that is to be paid, that the debtor cannot compel the creditor to receive it; but muſt be put to the expenſe of a ſuit. Our courts have never adopted this rigid principle of the common law; but guided by the plain dictates of reaſon and juſtice, we have introduced the practice of permiting a tender to be made, notwithſtanding the day of payment is elapſed, of the ſame ſum of money which the creditor would be entitled to recover by action, and ſuch tender has all the legal effect of a tendry at the day. This ſum is the principal and the intereſt, and if a ſuit has been commenced, then the legal coſt till the time of the tender. This is a principle of common law eſtabliſhed by our courts, and is a great improvement upon the common law of England.

10. We conſider how Contracts may be diſcharged.

We have already remaked, that contracts may be diſcharged by an expreſs or tacit acquittance. In addition to this, it may be obſerved, that contracts may be diſcharged by paying the thing due, and an acceptance by the creditor. It is a doctrine of the the common law, that no contract can be deſtroyed or diſcharged but by evidence of as high a nature, as the contract itſelf. Accord and ſatisfaction is no diſcharge of a covenant, and payment is no plea to a bond, becauſe being deeds, no plea of an act of the obligor is admitted, and the releaſe muſt be under hand and ſeal. But in this ſtate we have never adopted this diſtinction, which is ſo repugnant to common ſenſe. A parol releaſe would not by our law be a bar, but a written releaſe, tho unſealed, will diſcharge any

contract

contract of ever ſo high a nature. Accord and ſatisfaction, and full payment, are effectual pleas, ſupported even by parol teſtimony, to bar actions brought on covenants, bonds and contracts, of every deſcription. So that we may ſay with truth, that all contracts may be diſcharged by payment and ſatisfaction.

11. We ſhall cloſe this long chapter, by conſidering how Contracts may be avoided.

A man may avoid his contracts, by a variety of ways already enumerated, but under this head we ſhall treat of dureſs, and uſury.

To conſtitute a contract, it is eſſential that the perſon contracting, give his voluntary aſſent, and if he be compelled to make the contract by force and violence, the law calls it dureſs, and ſuch contract is not binding. There are two kinds of dureſs; by impriſonment, and by threats.

a Dureſs of impriſonment, is where a perſon is illegally impriſoned, by confinement in a common goal, or by the reſtraint of his lawful liberty elſewhere: when a perſon under ſuch reſtraint, enters into a bond or other ſecurity, to the perſon who unlawfully reſtrains him, for the purpoſe of gaining his lawful liberty, he may avoid ſuch bond, or ſecurity for dureſs of impriſonment. But where a perſon is lawfully impriſoned and enters into a contract to obtain a diſcharge from impriſonment, this is not dureſs, and the contract is binding. *b* Dureſs by threats, is either for fear of loſs of life, of limb, of mayhem, or impriſonment, and this muſt be a well grounded fear, which might operate upon a man of conſtancy and firmneſs. But a fear of battery, tho never ſo well grounded, is not dureſs, nor the fear of having one's houſe burned, or his goods taken away or deſtroyed: becauſe in ſuch caſes, ſhould the threat be performed, a man may have ſatisfaction, by his action to recover damages, but no compenſation can be made for the loſs of life or limb.

c Dureſs to avoid the contract, muſt be done to the party himſelf. If two enter into an obligation, for dureſs to one, the contract

a 2 Bac. Abr. 156. Co. Lit. 253. Leon. 239. *b* 2 Inſt. 483. 2 Rol. Abr. 124. *c* Lid. 63. 2 Bac. Abr. 157.

tract may be avoided by him, on whom the dureſs was practiſed, but is binding on the other. Dureſs by a ſtranger, by the procurement of the party, that is to have the benefit, is a good ground to avoid the contract, but dureſs by a ſtranger, without the privity of the obligee, is no cauſe to avoid. A ſon may avoid his contract for dureſs, to his father, and the father for dureſs to his ſon, and the huſband for dureſs to his wife, but the ſervant cannot avoid his contract for dureſs to his maſter, nor the maſter for dureſs to his ſervant.

Uſury is the taking of more than ſix per cent. for a year, upon the loan and forbearance of the payment of money, or any collateral article.

[d] It is enacted by ſtatute, that no perſon or perſons whatſoever, upon any contract made, ſhall take directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatſoever, above the value of ſix pounds for the forbearance of one hundred for a year, and ſo after that rate for a greater or leſſer ſum, or for a longer or ſhorter time: and that all bonds, contracts, mortgages and aſſurances whatſoever, made for the payment of any principal, or money lent, or covenanted to be lent upon, or for uſury, whereupon and whereby, there ſhall be reſerved or taken, above the rate of ſix pounds in the hundred, as aforeſaid, ſhall be utterly void.

All contracts which expreſsly carry more than lawful intereſt, or which include as principal, a greater ſum than was due, or loaned, for the purpoſe of ſecuring unlawful intereſt, are within the ſtatute. As for for inſtance, ſuppoſe I borrow of a perſon, one hundred pounds, and give him a note for a hundred and ten pounds with lawful intereſt, intending by the ten pounds to ſecure the uſury, the contract is void. So if I am indebted to a perſon, and he calls on me to renew my ſecurity, and I ſecure therein unlawful intereſt, that had previouſly ariſen, the new contract is uſurious. So it is, if I have paid unlawful intereſt from time to time, and that is not deducted at the time of giving the new ſecurity

[d] Statutes, 269.

rity, it is void; becauſe it contains a greater ſum than is due, which is owing to the uſurious agreement. Where a uſurious agreement is made, and various ſecurities are executed for the purpoſe of carrying it into effect, all ſuch ſecurities are void, whether uſurious or not, becauſe the general uſurious intent, contaminates, corrupts and deſtroys every thing that is part and parcel of the agreement. Thus if I borrow of a man a thouſand pounds, and give him my note for the ſame, payable with lawful intereſt, and then give him another note, for an hundred pounds, for the loan, and forbearance of the other note, over, and above the lawful intereſt: or if another perſon give him a note for the ſame purpoſe, here all the ſecurities are void. But if my friend become ſurety for me, in the uſurious contract, and I give him a bond of indemnity, and he is called upon, and pays ſuch uſurious contract, I cannot thereby avoid my bond given for the indemnity of the ſurety.

e If a contract be made for lawful intereſt, and then a ſubſequent contract be made for a greater ſum than legal intereſt upon the firſt, ſuch ſubſequent contract is void, but it does not invalidate the firſt. *f* It is a general rule, that if the principal and intereſt, be in hazard upon a contingency, it is no uſury, tho the intereſt do exceed the rate allowed by law. So if there be a hazard, that the lender may receive a leſs ſum than his principal. *g* But if the caſualty goes to the intereſt only and not to the principal, it is uſury, becauſe he is certain to have his principal again. But it muſt appear upon the face, or from the nature of ſuch contract, that there is a hazard in reſpect of the principal and intereſt, which was contemplated by the parties at the time of making the contract, and which was the foundation of the agreement, for the extraordinary premium; *h* for if it be only a colourable contingency, manifeſtly to elude the ſtatute, or if it appear that the parties did not conſidert the caſualty as the ground of allowance, for more than ſix per cent. intereſt, then ſuch contract is within the ſtatute. This principle may be illuſtrated by the caſe of Hamlin vs. Fitch. *i* This was an obligation given by the defendant and one Campbell for the payment of 16839 dollars in final ſettlement certificates, within ſix months from the date with lawful intereſt—and the verdict of the jury was, that at the time of

e Cro. Eliz. 90. *f* Cro. Jac. 208. *i* Wilſ. 286. *g* Cro. Eliz. 642. *h* Co. 70. *i* Cowp. 270. *i* Kirk. 262.

giving the obligation, it was corruptly agreed between the plaintiff, ſaid Campbell, and the defendant, to give the plaintiff one thouſand dollars in lawful money, for ſaid loan, for the term of ſix months, more than the lawful intereſt; and in purſuance of ſuch agreement, ſaid Campbell gave the plaintiff an obligation for that ſum, which was part and parcel of the ſame contract. Upon this verdict, the court upon a motion in arreſt, determined that the contract was not uſurious, becauſe the final ſettlement certificates were in a ſtate of rapid depreciation, and there was a hazard that the plaintiff would receive a leſs ſum in value, than the articles loaned, becauſe he was bound at the end of ſix months, to receive the ſame kind of ſecurities, let them be depreciated ever ſo much, or the value thereof in money, if he had recourſe to an action to compel a payment.

[k] A writ of error was brought to the ſupreme court of errors, and the judgment reverſed. As their reaſons contain ſome important principles, reſpecting uſury, I ſhall here inſert them at large.

The point of a loan, and corrupt agreement, between the parties, and Campbell, was directly put in iſſue, by the moſt correct and approved forms of pleading, and by them found for the plaintiff in error, in the very terms of the iſſue joined. The arreſt of judgment goes upon the the ground, that no corrupt agreement could exiſt in a caſe of this nature, where the thing loaned, was in a depreciating condition, and of a periſhable nature, and when the depreciation was at the riſque of the lender.

1. The jury were the proper judges, not only of the fact but of the law that was neceſſarily involved in the iſſue; not only that there was in fact reſerved by the agreement for loan and forbearance, more than at the rate of ſix per cent. per annum, but alſo of the legal deduction, that it was reſerved by corrupt agreement. If the circumſtances of the thing loaned were ſuch, that no corrupt agreement could ariſe out of the tranſaction, the jury ſhould have found for the defendant in error, whatever ſums were ſecured by the notes, but as they have found a corrupt agreement, it is too late for the court to ſay, that there is no ſuch corrupt agreement, the point being determined by the proper judges.

2. The

[k] Fitch vs. Hamlin, Supreme Court Errors, 1789.

2. The fact, that the thing loaned was in a depreciating condition, and of a perifhable nature, does not appear from the pleadings, and the court could not determine the fact by enquiry in pais, or by any matter dehors, the record upon the motion in arreft. This fact therefore, which was the fole ground of arrefting the judgment, the court affumed without proof.

3. Had there been evidence of the fact, it would not have juftified the court in arrefting judgment, or in giving judgment for the defendant in error on the demurrer, for there is no article whatever, that can be loaned but what may and frequently does change its relative value, not excepting gold and filver coin, and if it be lawful for the lender, to referve more than fix per cent. per annum, to fecure him from a poffible lofs, arifing from a depreciation in one thing, he may in all : but this would deftroy the ftatute againft ufury, and render it of none effect.

4. Whether at the time of the contract, in the prefent cafe, the article loaned, would appreciate, or depreciate, was perfectly uncertain, and a contract which in its creation was ufurious, could never be faved by any fubfequent contingent lofs, in the value of the principal loaned.

5. This contract, was not a bargain of hazard, as in the cafe of money lent on bottomry bonds, where the lender, by the act of lending, is expofed to the lofs of his whole principal : for in this cafe, the fecurities loaned were equally liable to lofs by depreciation, in whofever hands they were, and the lending did in no meafure encreafe the rifque.

A very common practice has taken place as a cover to ufurious contracts, to loan a perfon money, and then make him purchafe articles at a price, above their value, fufficient to fecure the unlawful intereft, and put the whole debt into the fame fecurity. The difficulty of afcertaining the precife value of goods, and of proving the ufurious intent, has hitherto rendered this mode an effectual fafeguard for ufury ; but there can be no doubt, if proof can be adduced, that under thefe circumftances, a higher price is given for goods, than their actual value, for the purpofe of concealing

the uſurious intent of the contract, that ſuch deceitful practices will be deemed an indirect mode of taking unlawful intereſt, and ſuch ſecurities may be declared void. *l*

m Where a note contains unlawful intereſt, and being put in ſuit, judgment is rendered upon it, on a hearing in damages, and a new note given for the judgment, the debtor cannot in an action on the new note, reſort back, and take advantage of any unlawful intereſt included in the firſt note.

n Where an obligation is given for the price of goods on abſolute ſale, tho ever ſo dear, it cannot be deemed uſury. So where public ſecurities were ſold to a perſon for a certain ſum, for which a note was taken, and an agreement made, that the debtor might return the ſpecific notes, within a certain term, or the note ſhould be paid in ſpecie only, here tho the public ſecurities were of leſs value than the ſum ſecured by the note at the time of the ſale, yet as the contract was for a ſale, optional however with the purchaſer to return them or pay the note within a certain time, it could not be uſury.

o The law makes void all obligations, for more than lawful intereſt, and the party may not reſort to an original juſt debt which was ſecured by a uſurious obligation, as the ground of another action, after ſuch obligation has been declared void by a court of law: for the loſs of ſuch debt is a penalty on the uſurer, and if he might recover it by a different form of action, the ſtatute would be defeated.

p Where a perſon takes a note for a ſum juſtly due, and at the ſame time, as parcel of the contract, the parties make a parol contract for the payment of a certain ſum over and above the lawful intereſt for forbearance of the note, it has been determined that ſuch note is void, tho no recovery could have been had on the parol contract.

The ſtatute reſpecting uſury, further enacts, *q* that in any action brought on any bond, bill, mortgage, or other inſtrument whatſoever, it ſhall be lawful for the defendant, to inform the court by

l Doug. 728, Cro. Eliz. 104. *m* Vouſe vs. Gibſon, S. C. 1791. *n* Wadſworth &c. vs. Champion, S. C. 1792. *o* Cowls vs. Hart, &c. S. C. 1792. *p* Atwood vs. Whittlefey, S. C. 1793. *q* Statutes 261.

by filing his bill with the clerk, on the ſecond day of the court, that ſuch contract is uſurious and oppreſſive, and for no juſt or reaſonable conſideration, and ſuch court may proceed in ſearching the truth of ſuch complaint, as a court of chancery, by examining the parties on oath, or in any other way proper to a court of equity, and if the plaintiff refuſe to be examined on oath, he ſhall become nonſuit, and if on trial, the court find the contract to be uſurious, they may adjuſt the ſame in equity, and give judgment that the plaintiff recover no more than the juſt value of the goods ſold, or than the principal ſum which the defendant received of the plaintiff, without intereſt, or any advance thereupon.

In conſtruction of this ſtatute, it has been determined that the defendant cannot be examined upon oath--but he may call on the plaintiff to teſtify, and then adduce any other proper proof.--- But the plaintiff may appeal to the conſcience of the defendant, and call upon him to teſtify.

Chapter Twenty-Sixth.

OF TITLE BY GIFT, SUCCESSION, COPY-RIGHT, AND FORFEITURE.

1. Of title by gift. [r] The transference of perſonal eſtate by gift, is gratuitous—which diſtinguiſhes it from contracts, for gifts are without and contracts upon conſideration. Every perſon has an abſolute power of diſpoſing of his perſonal eſtate. Of courſe, a voluntary gratuitous conveyance, without conſideration, is equally valid and effectual, as a conveyance on ſufficient conſideration, unleſs it be where ſtrangers, or creditors are affected. It has therefore become a ſettled maxim, that tho a conveyance by gift, ſhall be concluſive upon the giver, yet it ſhall not operate to defeat bona fide creditors of their juſt debts: for if a man ſhould make a gift of his eſtate, either real or perſonal, and ſhould not have enough left to diſcharge his debts, the creditors may take the eſtate which he has given away, in payment of their demands. For it is a maxim of law, as well as a principle of morality, that a man muſt be juſt, before he is generous.

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[r] 2 Black. Com. 440.

A gift muſt be accompanied with the immediate delivery of poſſeſſion, ſo that the transference may inſtantly take effect, and the gift become executed, by veſting the property of the thing given, in the donee. This may be verbally before witneſſes, or in writing, there being no particular mode adopted by law, as the requiſite of ſuch a mode of conveyance; it being ſufficient to ſhew that the donor meant to transfer and deliver the property to the donee. When a perſon has thus executed a gift, it is not in his power to retract it: but a mere promiſe to give without delivering the poſſeſſion, would not be binding; for a man cannot be compelled to fulfil a promiſe made upon no conſideration. A man however, will not be bound by a gift, where he was drawn in, circumvented, or impoſed upon by falſe pretences, ebriety or ſurpriſe.

ſ A gift of eſtate, is ſometimes made in the contemplation of death, and is called *donatio cauſa mortis*, and is a death-bed diſpoſition of property. As where a perſon in his laſt ſickneſs, apprehends his death to be near, delivers, or cauſes to be delivered to another, the poſſeſſion of any perſonal goods, (under which has been included bonds, and bills, drawn on his banker,) to keep in caſe of his deceaſe. This gift, if the donor dies is abſolute, excepting againſt creditors, and is accompanied with this implied truſt, that if the donor lives, it ſhall revert to himſelf, being only given in expectation of death.

2. Of title by ſucceſſion. † This is only applicable to corporations, capable of acquiring property, and the ſucceeding members acquire a qualified property, in all the goods of the corporation. This title to property, cannot ſtrictly be predicated of aggregate corporations. For the corporation in legal conſideration, has perpetual exiſtence, and is not varied by the change of members. It has a certain name by which it is known and diſtinguiſhed, and by which it is capable of acquiring property. This property therefore, muſt be conſidered, as veſted in the corporation, which is a mere ideal entity, exiſting only in contemplation of law. As a corporation has perpetual duration, there can be no acquiſition of property by ſucceſſion, for where a member is admitted

ſ 2 Blac. Com. 514. † P. Wms 406. 441. ‡ 2 Black. Com. 430.

admitted into the corporation, he becomes one of the conſtituent parts, and thus acquires a title to the goods of the corporation, and not by ſucceſſion to any other perſon.

But in caſe of a ſole corporation, and the treaſurers of the ſtate, counties or towns, may be conſidered as bearing ſome reſemblance to them, there may be a ſucceſſion. Therefore if a bond be given to the treaſurer of the ſtate, and his ſucceſſors in that office, then on his demiſe, or removal from office, his ſucceſſor may in his own name, bring a ſuit on ſuch bond.

3. Of the title by copy right. [u] It has been adjudged by the courts in England, that an author by the common law, has not the ſole excluſive right of printing and vending his works, but that, when once they have been printed and publiſhed, they become common property, and any perſon may reprint them. To encourage ſcience and literature, by ſecuring to authors, the benefit of their labors, it is enacted by ſtatute, [w] That the author of any book, pamphlet, map, or chart, being an inhabitant or reſident in the United States, his heirs and aſſigns, ſhall have the ſole liberty of printing, publiſhing, and vending the ſame, for the term of fourteen years, from the publication; and if the author be then living, he, and his heirs and aſſigns, ſhall have the ſame right for fourteen years more. If any perſon within ſuch term, ſhall print or reprint ſuch books, or ſhall import them from other places, where printed, and knowingly vend them, they ſhall forfeit to the proprietor double the value of the copies printed, imprinted, vended, or expoſed to ſale, to be recovered in an action brought before a proper court. The author, aſſignee, or proprietor, muſt firſt regiſter his name, as author, aſſignee, or proprietor, with the title of the work, in the office of the ſecretary of this ſtate, who is impowered and directed to enter the ſame of record.

If the author or proprietor, neglect to furniſh the public with neceſſary editions, or demands an unreaſonable price, the ſuperior court may order him to ſell at a reaſonable price, and on failure, may licence any perſon making complaint, to reprint and ſell at ſuch price, as the court judge reaſonable.

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[u] Donaldſon vs Becket, 1794. [w] Statutes, 113.

If any perſon procure and print any unpubliſhed manuſcript, without the conſent of the author or proprietor, he ſhall pay all damages which the proprietor or author ſuſtains. But as the Congreſs of the United States, have eſtabliſhed regulations which extend to the whole empire it is not probable that authors will in future take any benefit of this ſtatute, but will conform to the ſtate of Congreſs.

4. Of title by forfeiture. In England, a man for almoſt all the crimes he commits, is ſubjected to a forfeiture of all his perſonal eſtate: but here, the only crimes for which a man forfeits his eſtate to the public treaſury, are man-ſlaughter, and burning public magazines or veſſels, or in time of war, voluntarily delivering them into the hands of the enemy. Man-ſlaughter works an abſolute forfeiture of all the perſonal eſtate of the criminal; and in the other crime, the forfeiture is dependent on the diſcretion of the court.

Chapter Twenty-Seventh.

OF TITLE BY LEGACY, DESCENT, AND INSOLVENCY.

IN our preceeding enquiries, we have treated of the ſeveral modes of acquiring and transferring perſonal things, by perſons who are in being. In this chapter, I propoſe to conſider the law reſpecting the ſettlement of eſtates, upon the deceaſe of the proprietor. This will be comprehended under three heads, where the proprietor directs the diſpoſition of his eſtate by will, where he dies without will, and leaves his eſtate to be diſpoſed of by the operation of law; and where he dies inſolvent, not leaving a ſufficiency of eſtate to diſcharge his debts. In England, the ſettlement of eſtates, compoſes a part of the juriſdiction of the clergy. The biſhop of every dioceſe, exerciſes this power within the dioceſe. But in this ſtate, the juriſdiction of the clergy is confined to things ſpiritual, and they cannot in virtue of their miniſterial functions, intermeddle with temporal affairs. Judges of probate are appointed in certain diſtricts, who have the cognizance of the ſettlement of eſtates.

1. A legacy, is a teſtamentary diſpoſition of perſonal eſtate; it becomes therefore neceſſary to prepare the way for a conſideration of that ſubject, by an explanation of the law reſpecting wills.

The origin of wills, ſeems to have been co-eval with the exiſtence of mankind, and they unqeſtionably reſult from the conſtitution of nature. The policy of different nations, has laid them under various reſtrictions and regulations, for the purpoſe of preventing fraud and diſpute. The forms and requiſites eſtabliſhed by the poſitive laws of this ſtate, to render a will valid and effectual, will be fully conſidered in this chapter, under the following heads.

1. Who are capable of making a Will.
2. The requiſites of a Will.
3. Of the ſigning, ſealing, and atteſtation, of a Will.
4. Of the publication, and repubication of a Will.
5. Of nuncupative Wills and Codicils.
6. Of the proof, and the nature of Wills.
7. Of the revocation and avoidance of Wills.

1. I ſhall conſider who are capable of making a Will.

All perſons who are capable of making deviſes, are capable of making wills, to diſpoſe of their perſonal eſtate; and an infant, when arrived to the age of ſeventeen years, may diſpoſe of his perſonal eſtate by legacy.

[x] A married woman, cannot make a diſpoſition of perſonal eſtate by will, without the conſent and licence of her huſband; becauſe all the perſonal eſtate is by the marriage veſted in the huſband; but if the huſband conſent to the will, it ſhall be binding and valid: and the huſband frequently covenants with the relations, or ſome friend of the wife, that he will conſent to and allow her liberty to make a will. Such will however, is not good without the aſſent of the huſband, tho he has contracted to grant her permiſſion: but this will prevent him from taking adminiſtration on her eſtate, which ſhall be granted to the perſon by her appointed, and the huſband is bound by his covenant to allow it.

[x] 3 Lac. Ab. 498. 4 Rep. 51. 2 Bro. C. Com. 498.

If a married woman make a will, and the huſband ſuffer it to be proved, and deliver the goods, it ſhall be binding upon him. The huſband may at any time before the death of the wife, revoke the will, to which he has aſſented, but cannot afterwards, unleſs it be done before the will is proved. If a woman make her will, and afterwards marry, ſuch ſubſequent marriage, is a revocation of the will. Traitors and felons, by the Engliſh law, are incapable of making wills, by reaſon of the forfeiture of their goods, but by our law, as there is no forfeiture of eſtate for crimes puniſhable with death, ſuch criminals are not deprived of the power of making wills.

2. The requiſites of a Will.

y The teſtator muſt be capable to make a will, and not be under any legal diſabilities. There muſt be ſome perſon in being, who ſhall be capable of taking the thing given at the time, it ought to veſt, or the gift will be void. The teſtator at the time of making the will, muſt have a mind or ſerious intent to make a will. This muſt be evidenced by a ſolemn deliberate act, and therefore any raſh, unadviſed, or jeſting converſation, will be of no force. The mind of the teſtator muſt alſo be free, and uninfluenced by fear, fraud, or flattery, for if he be moved by fear, circumvented by fraud, or overcome by immoderate flattery, the will is void. So if a man in a ſtate of inebriety, make a will, it is void.

3. Of the ſigning, ſealing, and atteſtation of a Will.

It is not material on what a will is written, whether paper or parchment, or in what language or character, nor whether the expreſſions are proper and grammatical, provided the will be legible, and the intent of the teſtator be diſcoverable: but if it cannot be read, or the expreſſions are ſo obſcure, ambiguous, and uncertain, that the intention of the teſtator cannot be collected from it, then it is void. Regularly, a will ought to be ſigned and ſealed by the teſtator—but I apprehend, the want of a ſeal would not nullify it. By the common law, if a teſtator write his name at the beginning of a will, and ſeals it, or ſeals it only, it will be

y 5 Bac. Abr. 504. 501.

be ſufficient to render the will valid. Wills that contain deviſes of land, muſt be atteſted by three witneſſes, but where perſonal eſtate only is diſpoſed of, no witneſſes are required.

4. Of the publication and republication of a Will.

z The publication of a will, is an eſſential part of it, tho the law has preſcribed no particular mode. Any act or declaration, importing a ſolemn intent in the teſtator, to diſpoſe of his eſtate, will be ſufficient; but without ſome ſuch act or declaration, the inſtrument will not be good as a will. The delivery of a will as a deed, has been adjudged to be a good publication. A publication may be inferred from ſuch circumſtances, as evidence the intent of the teſtator, and will have the ſame force to render the inſtrument valid, as if expreſſed by parol declaration. If the teſtator ſhew the will to witneſſes, ſaying there is my laſt will and teſtament, or herein is contained my laſt will and teſtament, this is ſufficient, without making the witneſſes privy to the contents, provided the witneſſes can atteſt to the identity of the writing. It is neceſſary that the whole will ſhould be preſent at the time of atteſtation, for if a man make a will on ſeveral pieces of paper, and none of the witneſſes ever ſaw the firſt, this is not a good will.

a A will if not actually obliterated and deſtroyed, may altho revoked, be revived by a ſubſequent republication: for being an ambulatory inſtrument, deriving its efficacy from the intent of the teſtator, it may be reſcinded, ſuſpended, enlarged or contracted, as to its operation at the pleaſure of the teſtator. At common law, very ſlight words effect a republicatian, it being an act peculiar favoured. Therefore any act done by the teſtator ſubſequent to the revocation, by which he demonſtrated an intent that the will ſhould ſtand, amounted to a republication.

b A codicil, tho not annexed to a will, is a republication, i it clearly relates to the ſubject matter of the will, thereby plainly evincing, that the teſtator contemplated that, as his will at the time of making the codicil.

z Powell Devi. 31, 86. a Ibid. 652. b Ibid. 658.

[c] The effect of a new publication of a will is, that all which the words of the will embrace at the time when the new publication is made, ſhall paſs thereby: and the terms and words of the will, ſhall be conſtrued to ſpeak with regard to the property the teſtator is poſſeſſed of, and the perſons named therein at the date of the republication, juſt the ſame as if he had had ſuch additional property, or ſuch perſons had been in being, at the time of making his will, the concluſions from that fact, being that the teſtator ſo intended. The next conſideration therefore, upon a will ſo republiſhed, is what the words of the will at the time of republication import, for they will operate to their full extent, at that time, juſt the ſame as if the teſtator had then made a new will.

5. Of nuncupative Wills and Codicils.

Wills are of two kinds, written, and unwritten, and the latter are called nuncupative. Theſe are allowed only in caſes where in extreme and dangerous ſickneſs, the teſtator has neither time, nor opportunity to make a written will—and ſeriouſly and deliberately declares his intention reſpecting the diſpoſition of his eſtate, before a number of witneſſes, called for that purpoſe. But this will muſt immediately be reduced to writing and proved before the court of probate, as ſoon as practicable, for the law will not ſuffer ſuch things to reſt for any length of time, on the memory of witneſſes, on account of the danger of fraud. A nuncupative will, muſt be made by a man in his laſt ſickneſs, at home or among his friends, or family, unleſs by unavoidable accident, to prevent impoſition by ſtrangers.

[d] A codicil is a little writing, being a ſupplement, or addition to a will, made by the teſtator, and annexed to it, for the purpoſe of explaining, altering, adding to or ſubtracting from ſome of the former diſpoſitions of the eſtate by the will; and this may be in writing, or without, and is then called nuncupative.

6. Of the proof, and the nature of Wills.

[e] A written will, which contains only a diſpoſition of perſonal eſtate, is valid, and ſufficiently proved, if it be written in the teſtator's own hand, tho it has neither name nor ſeal to it, nor witneſſes

[c] Powell Devi. 674. [d] 2 Black. Com. 500. [e] Ibid. 501. 3 Bac. Abr. 514.

neſſes preſent at the publication : but it muſt be written fair and plain, and there muſt be proof that it is his hand writing. If it be written in another man's hand and never ſigned by the teſtator, yet if it can be proved to be according to his inſtructions, and approved of by him it ſhall be good. But the better way is to have wills ſigned, and publiſhed in the preſence of witneſſes.—When a will is found among the choiceſt papers and evidences of the teſtator, or locked up in a ſafe place, the evidence is eſteemed concluſive : but tho it be found in ſuch places, yet if it be written in another's hand, or if the name or ſeal of the teſtator, or one of them be not annexed to it, then ſome further proof will be required. If a writing be found, under the teſtator's own hand, yet if it be but a ſcribling writing, written copy-wiſe, with a great diſtance between the lines, in ſtrange characters, with many interlineations, lying among his waſte papers, this ſhall not be accounted his will—but a draft or direction for it : but if it can be proved that the teſtator declared, that this ſhould be his will, it is ſufficient proof of it, and it ſhall be effectual. If it be proved that the teſtator declared his will, was in the hands of a third perſon, who produces ſuch a writing, and ſwears to the identity, this will be ſufficient proof ; if he ſaid it was written by his own hand, then it muſt be proved by compariſon of hands. If a witneſs will teſtify, that the writing produced, to be the laſt will of the teſtator, is his will, or that he ſaid it was, or that it ſhould be, or that it is the ſame writing, that was ſhewed him, and to which he is a witneſs, this ſhall be ſufficient proof, tho he never read or ſet his hand to it.

[e] In reſpect of the nature of wills, it may be obſerved, that a will differs from all other acts and deeds, which mankind do in this life : for tho it be made, ſealed and publiſhed in ever ſo ſolemn a manner, yet it has no operation till the death of the teſtator. A man may therefore alter or revoke his will, when he pleaſes, and make as many new one's as he thinks proper. Every new will, is a revocation of all former one's, without any expreſs words or declarations for that purpoſe : but codicils are not, becauſe they are only additions, or ſupplements to them. A teſtament

[e] 5 Bac. Abr. 520.

ment is ſaid to have three degrees: an inception, which is the making of it,—a progreſſion which is the publication,—and a conſummation which is the death of the teſtator. When a will is perfected by the death of the teſtator, it transfers eſtates as effectually as deeds.

7. Of the revocation and avoidance of Wills.

f A perſon may revoke his will at any time when he pleaſes, and ſuch revocations are expreſs or implied. Expreſs revocations are ſome poſitive act of the teſtator, and may be in writing or parol. Revocations by writing are where the teſtator by a ſubſequent will or codicil, expreſsly revokes a preceding will. Revocations by parol. are where the teſtator ſeriouſly and deliberately declares, with an intention to revoke, that he revokes his will, or that it ſhall not ſtand, or any other words clearly evincive of ſuch intention.

Implied revocations, are where the teſtator makes ſome declaration, or does ſome act which amounts in law to a revocation, becauſe it furniſhes the ground to preſume that his mind is changed. If he declare, that a certain perſon who is his heir at law, ſhall inherit his eſtate, this will revoke a will giving it to a ſtranger. So a ſubſequent will or a codicil, different from the former, tho containing no expreſs words of revocation, will revoke it. So if the eſtate be altered, ſold, loſt, or conſumed.

A will may be avoided and ſet aſide by the courts of probate, or by the ſuperior court, on an appeal to them, when the teſtator had not a legal capacity to make it, and where any artful fraudulent plans or undue meaſures, were practiſed to circumvent him; and if advantage is taken of his age, infirmity and weakneſs, and it appears that the will was not altogether voluntary, and framed agreeably to his true intent and deſign, reſpecting the diſpoſal of his eſtate. But where a man in the exerciſe of his rational faculties, and free from any reſtraint upon his mind, makes a teſtamentary diſpoſition of his eſtate, it is not in the power of courts of law or equity to ſet them aſide; tho he may have made a very improper diſpoſition of it, and diſregarding children and relations, has given it to utter ſtrangers. For as he has an abſolute power to

diſpoſe

f Powell on Devi. 532. 5 Bac. Abr. 523

diſpoſe of his eſtate by will, the law regards not the perſon to whom it is given, but only conſiders whether he acted voluntarily and poſſeſſed the exerciſe of his reaſon at the time of the tranſaction.

In the next place, I proceed to the conſideration of the office and duty of an executor. It is an eſſential ingredient in a will, that an executor be appointed to carry it into execution, and if none be appointed, it is to be conſidered as a codicil rather than a will: but if by any means an executor be wanting, the court of probate may ſupply the defect. For the illuſtration of this ſubject, I ſhall conſider,

1. Who may be Executors, and of Adminiſtrators who act inſtead of Executors.

2. Of the power and duty of Executors.

3. Of Co-Executors, and when Executors are liable to pay the debts out of their own eſtate.

4. Of actions brought by, and againſt Executors.

5. Of Executors in their own wrong.

1. Who may be Executors, and of Adminiſtrators who act inſtead of Executors.

[g] Every perſon who is capable of making a will may be appointed an executor, and ſo may married women and minors, who are capable at the age of ſeventeen years, of executing the truſt. But where the teſtator appoints no executor, or the executor dies, or refuſes to accept the truſt, or to give bonds with ſurety, for the faithful adminiſtration of the eſtate, then the court of probate may commit adminiſtration of the eſtate, with the will annexed, to the widow or next of kin, and upon their refuſal or incapacity, to one or more principal creditors, as they ſhall think fit, and in caſe the executor appointed by the teſtator, be under the age of ſeventeen years, then an adminiſtrator may be appointed during the minority of ſuch executor; and in theſe caſes, the adminiſtrator with the will annexed, is in the ſame ſituation with the executor, only one derives his authority from the appointment of the court of probate, and the other from the will, but their power and duty are the ſame.

If

[g] 2 Black. Com. 503.

[h] If a perſon dies inteſtate, and adminiſtration is granted upon his eſtate, and the adminiſtrator dies, without having fully adminiſtered, then new adminiſtration muſt be granted by the court of probate, of the goods and eſtate not adminiſtered, : for the firſt adminiſtrator cannot continue the truſt repoſed in him, to his executor or adminiſtrator. But if an executor dies, not having fully adminiſtered, and appoints an executor, the truſt devolves upon him : if he dies without an executor, then adminiſtration muſt be granted upon the eſtate, not adminiſtered, with the will annexed.

The court of probate, may cite the widow, next of kin and creditors, to take letters of adminiſtration in theſe caſes, and on their refuſal, may appoint others.

2. Of the power and duty of Executors.

[i] A perſon knowing that he is appointed executor of the will of any deceaſed perſon, muſt within thirty days after the deceaſe of the teſtator, cauſe ſuch will to be proved, and recorded in the regiſter's office, in the diſtrict where the deceaſed laſt dwelt, or preſent ſaid will, and declare his refuſal to accept of the executorſhip, upon penalty of forfeiting, without ſufficient excuſe made and accepted by the judge of probate, five pounds per month, after thirty days, till he cauſe the ſame to be done.

[k] An executor muſt ſee that the deceaſed is buried in a manner ſuitable to his rank and dignity in life, and all reaſonable expenſes will be allowed. He muſt cauſe the will to be proved in the probate court, and there lodged and recorded. The probate of the will, in the diſtrict where the deceaſed laſt dwelt, is ſufficient and will extend thro the ſtate

[l] The executor muſt give bonds with ſurety, for the faithful management and ſettlement of the eſtate. He muſt collect all the eſtate of the deceaſed, and calling two or more diſintereſted judicious freeholders, neighbours and friends to the deceaſed, he muſt in their preſence, and by their direction, they being under oath, cauſe to be made a true and perfect inventory, of all the eſtate of the deceaſed, both real and perſonal, and cauſe the ſame to be indented

[h] 2 Dac. Abr. 385. Swinb. 396. [i] Statutes, 52. [k] 2 Black. Com. 508. [l] Statutes, 52.

dented, one part of which, ſhall be kept by the executor, and the other part be lodged with the court of probate. If the executor neglects to make an inventory within two months after the deceaſe of the teſtator, without ſufficient excuſe made to the acceptance of the judge of probate, he ſhall forfeit five pounds per month, till the ſame be done. An inventory purports not only an account of all the eſtate, but an appraiſal at its juſt value.

m An executor in virtue of his office, gains a temporary qualified property, in all the perſonal eſtate of the deceaſed: but he has no power over the real eſtate, only to cauſe it to be inventoried and appraiſed, unleſs there be more debts that can be paid by the perſonal eſtate, in which caſe the court of probate may order a ſale of ſufficient real eſtate, to be made by the executor, to diſcharge the debts. But the real eſtate, is ſuppoſed on the death of the teſtator, to deſcend inſtantly to the deviſees.

The executor has full power, to ſue for and collect all debts due to the teſtator, and to recover all the goods and chattels which belonged to him; for he is conſidered as the repreſentative of the deceaſed, and is inveſted with the ſame power. Whatever debts are recovered, and whatever eſtate is of a ſaleable nature, and may be converted into money, are called aſſets in his hands; which he may convert into ready money, and pay the debts and demands upon him, as executor.

n If any perſon or perſons, in this ſtate, ſhall have in their cuſtody, any goods or chattels, belonging to the eſtate of any deceaſed perſon, or any bills, bonds or accounts, or ſuch other things as may tend to diſcloſe ſuch eſtate, and on demand by the executor, or adminiſtrator, ſhall refuſe to make delivery, or give a ſatisfactory account, it ſhall be in the power of the next aſſiſtant or juſtice of the peace, to iſſue a warrant to apprehend and bring ſuch perſons before them, and bind them with ſufficient ſureties, to appear before the next court of probate, who are impowered to examine them on oath, reſpecting ſuch things; and on their refuſing to anſwer every interrogatory, to commit them to goal, till they conform.

m 2 Black. Com. 510. *n* Statutes, 53.

The executor muſt pay the funeral charges of the deceaſed, and the expenſe of ſettling the eſtate, and alſo all his juſt debts. To aſcertain the debts, and bring eſtates to a ſpeedy ſettlement, it is enacted by ſtatute, * that the courts of probate be impowered to direct executors and adminiſtrators, to give public notice to the creditors, to bring in their claims within ſuch time, as the court ſhall limit, not exceeding eighteen months, nor leſs than ſix, by poſting up the ſame in the town where the deceaſed laſt dwelt, and by advertiſing in one or more of the public newſpapers in the ſtate, and any further notice that the court ſhall judge neceſſary: and if any creditor, ſhall neglect to bring in his claim within that time, he ſhall be forever debarred of any recovery, excepting creditors living out of the ſtate, who may exhibit their claims within two years, after publication of notice: and ſhall be entitled to receive payment out of the clear eſtate that remains after the payment of the debts exhibited in the limited time.

When the debts are aſcertained, it becomes the duty of the executor to pay them, and for that purpoſe, he may diſpoſe of the perſonal eſtate of the teſtator; † and if that be inſufficient, then in caſes, both of teſtate and inteſtate eſtates, it is in the power of the court of probate, to order the ſale of ſo much of the real eſtate, as ſhall raiſe ſufficient money to pay the ſame, with incident charges of ſale, in ſuch manner as ſhall appear to be moſt beneficial to the eſtate. An executor in the ſettling and paying of debts, muſt conſider them all, as ſtanding on the ſame baſis: and whether they are ſecured by judgment, ſpeciality or ſimple contract, there is no preference. By the common law, if a man makes his debtor his executor, this ſhall be a releaſe of the debt, in preference to legacies, provided there be ſufficient aſſets to pay the debts.

When the debts are all paid, then it becomes the duty of the executor, to deliver over the eſtate, agreeable to the directions of the will. When the legacy is in ſome ſpecific article, then the delivery of that article, will diſcharge the executor: if it be for the payment of a certain ſum of money, the payment of that ſum, diſcharges

* Statutes, 56. † Ibid.

diſcharges the legacy: but if the legacy be not ſpecific, and contains a certain portion of goods, then a legal diſtribution muſt be made by diſtributors, appointed for that purpoſe by the court of probate.

3. Of Co-Executors, and when Executors are liable to pay debts out of their own eſtates.

p A teſtator may appoint different perſons to execute different parts of his will; but a ſole executor, cannot accept to execute a part and not the whole. If a man appoint ſeveral joint executors, they are eſteemed as one perſon, repreſenting the teſtator, and therefore, the acts done by any one of them, which relate to either the delivery, gift, ſale, payment, poſſeſſion, or releaſe of the teſtator's goods, are deemed the acts of all; for they have a joint and entire authority over the whole.

q It ſeems to be a ſettled principle, that one executor ſhall not be charged with the wrong or waſte of his companion, and ſhall be liable no further than for the aſſets that came to his hands. One executor cannot regularly ſue another, for any thing that relates to the will, or that is within the power, duty and office of an executor. It is enacted by ſtatute, that executors, who are alſo reſiduary legatees, when all or any part of their legacies are withholden from them, by their co-executors, may bring their action of account againſt their co executors, for the recovery thereof: and the like action is allowed to the reſiduary legatees, againſt executors. As joint executors, in repreſenting the teſtator, make but one perſon, they muſt all join in ſuing, and all be joined when ſued, but of this, no advantage can be taken only in abatement.

The executor is liable to pay debts out of his own eſtate when the creditor has recovered judgment againſt him, in the capacity of executor, and taken out execution againſt the eſtate of the deceaſed in his hands, and the executor neglects or refuſes to deliver ſuch eſtate upon the execution, and the ſame is returned non eſt inventus. Then the creditor may bring a ſcire facias againſt the

p 2 Bac. Abr. 335. *q* Cro. Eliz. 137. Cro. Eliz. 313.

executor, and have judgment affirmed againſt his perſon and eſtate.

r A devaſtavit, is defined to be a miſmanagement of the eſtate and effects of the deceaſed, in ſquandering and miſapplying the aſſets, contrary to the truſt and confidence repoſed by them, and for which, by the common law, executors and adminiſtrators are anſwerable out of their own property, as far as they had or might have aſſets of the deceaſed. Executors may be guilty of a devaſtavit, not only by a direct abuſe, as by ſpending or conſuming the effects of the deceaſed, but alſo by ſuch acts of negligence and wrong adminiſtration, as diſappoint creditors of their debts. Therefore ſelling things under their value, or neglecting to ſell them at a proper time, will amount to a devaſtavit. *s* So an executor who releaſes a debt, ſhall be charged to the value of it, let him receive ever ſo ſmall a ſum. *t* If he pays money in diſcharge of a uſurious bond, entered into by the teſtator, it is a devaſtavit, if he be knowing to the fact. *u* By the common law, if he take a bond in his own name, for debt due by ſimple contract, he ſhall be chargeable as much as if he had received the money. But in this ſtate, I preſume that the taking a note for a book debt, or a new note for an old debt, would not charge the executor, if he be guilty of no neglect. *w* So if an executor ſubmits the debt, or whatever he is entitled to, in right of the teſtator, to arbitration, and the arbitrators award him leſs than his due, this being his own voluntary act, ſhall bind him, and he ſhall anſwer for the full value.

By our law, an executor or adminiſtrator, can never plead that he has no aſſets, or that he has fully adminiſtered. For in all caſes, where the eſtate of the deceaſed is inſufficient to pay his debts, the eſtate muſt be repreſented inſolvent, and then ſettled in the manner preſcribed by law. No action therefore is ever brought by a creditor againſt an executor or adminſtrator, on the ground of a devaſtavit; for if the eſtate be ſolvent the devaſtavit of the executor, is no injury to the creditor: and if it be inſolvent, then an action is brought on the bond, given by the executors to the court of probate, for the benefit of the creditors; in which action

r 2 Bac. Abr. 431, *s* Hob. 66. *t* Ibid. 167. *u* 2 Lev. 189. *w* 3 Leon. 41.

action full damages may be recovered, not only for a devaſtavit, but for any default or neglect in the adminiſtration of the eſtate. In like manner, where the eſtate is ſolvent, and the adminiſtrator or executor guilty of a devaſtavit, action will lie on the bond, to recover the damages ſuſtained by the heirs and legatees.

4. Of actions brought by and againſt Executors.

x An executor ſtands in the place of the teſtator as his repreſentative, he may therefore maintain an action in his right, upon all contracts, on which action would lie in favour of the teſtator: and is liable to actions on all contracts made by the teſtator, on which he was liable himſelf. But by the common law, an executor cannot bring an action of treſpaſs, for a tort done to the perſon, or goods or chattels of the teſtator, in his life time. *y* But it has been adjudged, that an adminiſtrator may bring trover for goods converted in the life time of the inteſtate.

Executors or adminiſtrators after the will is proved, may bring trover for the goods of the deceaſed, converted by a ſtranger, before the will is proved. For altho an executor has no property in the goods of the teſtator till he has proved the will, yet as ſoon as this is done, he does by relation acquire a general property therein, from the time of the death of the teſtator: and in ſuch caſes, he need not name himſelf as executor, becauſe his action is grounded on the qualified property, acquired as executor, which is ſufficient to maintain his action.

z When an action of debt is brought againſt an executor, it muſt be in the detinet only; for he is not perſonally liable, but only in reſpect of the teſtator's eſtate, he therefore cannot be ſaid to owe. The deceaſed in his life time may be ſaid to have owed the debt, and the executor detains it. In England, the perſonal eſtate only, is aſſets in the hand of the executor, for the payment of debts, and the real eſtate deſcends to the heirs. In caſe the perſonal eſtate proves not ſufficient to pay the debts, actions will lie againſt the heirs on all contracts where they were bound.— *a* But in this ſtate, the real eſtate as well as the perſonal is charged with the payment of debts. if neceſſary, and is aſſets in the hands of

x 2 Bac. Abr. 443. *y* Kirby vs. Clark, S. C. 1792. *z* 1 Roll. Abr. 603. *a* Phelps vs. Miles, &c. S. C. 1790.

of the executor or adminiſtrator, and may by them be diſpoſed of for the payment of debts. The ſtatute law has provided modes, by which all the eſtate of the deceaſed if neceſſary, may be applied in payment of his debts, before it can veſt in his heirs. It is therefore neceſſary that proviſion ſhould be made for an action againſt them, for a debt due from the deceaſed.

[b] Action of aſſumpſit was brought againſt an adminiſtrator, ſtating a debt againſt the inteſtate, that real eſtate had been ſold to pay debts, and the defendant had the money in his hands, laying a promiſe of the adminiſtrator, to pay in his perſonal capacity. On the plea of non-aſſumpſit, the court were of opinion, that the adminiſtrator, receiving a ſufficiency of the eſtate of the inteſtate, did not ſubject himſelf to an action, to pay out of his own eſtate in the firſt inſtance.

[c] The law reſpecting the actions that can be maintained againſt executors and adminiſtrators, is ſettled by lord Mansfield, in the caſe of Hambly againſt Trott, with a perſpecuity and elegance, that diſtinguiſh all adjudications of that great man and reſpectable judge.

The maxim, that perſonal actions die with the perſon, is denied to be generally true; and he makes a diſtinction between actions, which ſurvive againſt an executor, or die with the perſon, on account of the cauſe of action, and actions that ſurvive againſt an executor, or die with the perſon on account of the form of action.

1. Where the cauſe of action, is money due, or a contract to be performed, gain, or acquiſition of the teſtator by the work and labour, or the property of another, or a promiſe by the teſtator expreſs or implied,—where theſe are the cauſes of action, the action ſurvives againſt the executor. But where the cauſe of action is a tort, or ariſes from a crime, ſuppoſed to be by force, and againſt the peace, the action dies: as battery, falſe impriſonment, treſpaſs, words, nuiſance, obſtructing lights, diverting a water courſe, eſcape againſt the ſheriff, and many others caſes of like kind.

2. As to thoſe actions which ſurvive or die, in reſpect of the form of action. In ſome actions, the defendant could have waged his law, and therefore no action lies in that form againſt an executor

[b] Aplin vs. Roberts, S. C. 1792. [c] Cowp. 371.

cutor. But now, other actions are ſubſtituted in their room upon the very ſame cauſe, which do ſurvive and lie againſt the executor. No action, where in form, the declaration muſt be with force and arms, and againſt the peace, or where the plea muſt be, that the teſtator was not guilty, can lie againſt the executor.—Upon the face of the record, in ſuch caſe, the cauſe of action ariſes from a tort or crime, and all private, criminal injuries, as well as all public wrongs, are buried with the offender.

But in moſt, if not all the caſes, where trover lies againſt the teſtator, another action might be brought againſt the executor, which would anſwer the purpoſe.

An action on the cuſtom, againſt a common carrier, is for a tort and ſuppoſed crime. The plea is not guilty, and therefore it will not lie againſt an executor. But aſſumpſit, which is another action for the ſame cauſe, will lie. So if a man take a horſe from another and bring him back again, an action of treſpaſs will not lie againſt his executor, tho it would againſt him—but an action for the uſe and hire of the horſe, will lie againſt the executor.

An action was brought againſt an executor, alledging the delivery of a cow, to the teſtator, to keep for the uſe of the plaintiff, and that the teſtator ſold the cow, and converted the money to his own uſe. Here the executor cannot be chargeable in treſpaſs, or trover, for the wrongful act of converting the money; but an action will lie againſt him for the money had and received, by the teſtator.

There ſeems to be this fundamental diſtinction. If it is a ſort of injury, by which the offender, acquires no gain to himſelf, at the expenſe of the ſufferer, as beating, or impriſoning a man, there the perſon injured has only a reparation for the crime in damages, to be aſſeſſed by a jury. But where beſides the crime, property is acquired, which benefits the teſtator, there an action for the value of the property, ſhall ſurvive againſt the executor. As for inſtance, the executor ſhall not be chargeable for the injury done by his teſtator, in cutting down another man's trees, but for the benefit ariſing to his teſtator, for the value or ſale of the trees, he ſhall.

So

ſo far as the tort itſelf goes, an executor ſhall not be liable, and therefore it is, that all public and private crimes die with the offender, and the executor is not chargeable: but ſo far as the act of the offender is beneficial, his aſſets ought to be anſwerable, and his executor therefore ſhall be charged.

5. Of Executors in their own wrong, or de ſon tort.

An executor in his own wrong, is a perſon who without any authority from the deceaſed, or the court of probate, does ſuch acts as belong to the office of an executor or adminiſtrator. There are a variety of acts which will make a man an executor in his own wrong, ſuch as poſſeſſing, and converting the goods of the deceaſed to his own uſe, paying his debts out of his aſſets, ſuing for, and receiving his debts, and generally all acts of acquiring, poſſeſſing, and transfering the eſtate of the deceaſed, will make a man an executor in his own wrong, becauſe theſe are the only indicia, by which creditors can know againſt whom to bring their actions: and therefore in ſuits againſt executors in their own wrong, they are named as executors generally. A perſon may be an executor in his own wrong, by releaſing debts due to the deceaſed, by paying legacies with his effects, by entering on a ſpecific legacy without the executor's aſſent, by paying and diſcharging the mortgages of the deceaſed with his money and goods: by delivering to the wife of the deceaſed, more apparel than is ſuitable for her, or by anſwering as an executor to any action brought againſt him, or by pleading any other plea, than that he never was executor.

A man may take care of the funeral of the deceaſed, feed his cattle, take an inventory of his eſtate and effects, diſcharge his debts and legacies with his own money, repair the houſes in decay, and provide neceſſaries for his children, without being an executor in his own wrong, for theſe are acts of kindneſs and charity.

There cannot regularly be a rightful executor, and an executor in his own wrong, for when there is a rightful executor or adminiſtrator, a ſtranger who acquires poſſeſſion of the goods of the deceaſed, is a treſpaſſer, and may be ſued as ſuch: but this muſt be underſtood where he takes poſſeſſion of the goods, as a treſpaſſer, for it

e 2 Black. Com. 507. 2 Bac. Abr. 387, 388, 389.

if there be a rightful executor, and a ſtranger takes the goods of the teſtator or inteſtate, and claiming to be an executor, pays debts, and legacies, receives debts, enters upon a term for years in name of the deceaſed, or otherwiſe intermeddles, he is an executor in his own wrong. If a ſtranger get poſſeſſion of the eſtate, before the probate of the will, he is an executor in his own wrong, becauſe the lawful executor can only be chargeable with the goods that come to his hand. But he may bring an action againſt the wrongful executor, who cannot plead payment of debts to the value, or that he has given the goods in ſatisfaction of debts: becauſe no man may obtrude himſelf upon the office of another, but on the general iſſue, ſuch payment may be allowed in mitigation of damages.

The value of the thing taken by a ſtranger, ſo as to make him an executor in his own wrong, is immaterial, where he pleads that he never was executor, and they have been ſubjected to pay a debt of ſixty pounds, for taking a bedſted, and a hundred pounds for taking a bible. By the common law, an executor in his own wrong, may pay juſt debts, and he is liable to the amount of the eſtate that comes to his hands, and may plead that he has fully adminiſtered. But as our law admits of no ſuch plea, and as a perſon when he is once an executor in his own wrong, can not exculpate himſelf by taking letters of adminiſtration, but may ſtill be ſued as an executor in his own wrong, it follows in the caſe of an inſolvent eſtate, that a man for intermeddling might be ſubject to the payment of all the debts, let him receive ever ſo ſmall a ſum, becauſe he cannot repreſent the eſtate inſolvent.

Having conſidered the nature of Wills, and the office of Executor, I ſhall in the next place treat of legacies, which are the ſubſtantial part of wills, and the payment of which conſtitute a principal branch of the duty of executors.

ſ A legacy is defined to be a bequeſt, or gift of goods, and chattels by teſtament, and the perſon to whom the gift is made, is called the legatee. Properly ſpeaking, deviſe relates to a gift of lands by will, and legacy, to a gift of perſonal eſtate, tho they are

ſ 2 Black. Com. 512. 3 Bac. Abr. 466.

both ſometimes uſed indiſcriminately. Any words that can be uſed which ſignify an intention to make a gift of ſome chattel to ſome perſon, who is ſo deſcribed that he can be known, will conſtitute a legacy; and any perſon in being is capable of taking a legacy. The general principles already ſtated reſpecting deviſes, will apply to legacies, excepting that general words in a will, will diſpoſe of all the perſonal eſtate, the teſtator owns at his deceaſe, tho acquired after making the will.

[g] An ademption of a legacy is revocation of it, and a tranſlation is the giving the thing to ſome other. [h] Where the teſtator makes a legacy to a perſon of the ſame, or a greater ſum than he is indebted to him, if it appear that ſuch legacy was intended to go in ſatisfaction of ſuch debt, then ſuch perſon is not entitled both to the legacy and debt. But if the legacy be leſs than the debt, or payable in a different article, or if it does not appear that ſuch was the intent of the teſtator, then the legatee ought to recover both, for it cannot neceſſarily be preſumed, that the teſtator intended that the legacy ſhould diſcharge the debt.

Legacies on condition muſt be governed by the ſame general rules of conſtruction, as conditional contracts, excepting where they are in reſtraint of marriage, and there the rule is that all conditions for the reſtraint of marriage generally, are void, becauſe they are prejudicial to ſociety: but that a condition which reſtrains marriage as to time, place, or perſon, is good.

[i] Legacies are general, and pecuniary, as where a certain portion of goods, or money are given. Specific, as where ſome particular article of eſtate is given, as a piece of plate, a horſe, or the like. Where there is a deficiency of aſſets to pay the debts, all the general legacies muſt abate in proportion to make good the defect: but no reduction ſhall be made from ſpecific legacies, if there is eſtate enough beſide: but when the debts have ſwallowed up all the general legacies, then the ſpecific legacies may be taken to pay them. If the legacies are paid, and debts are diſcovered beyond the amount of the remaining eſtate, then the legatees are liable to refund their proportion to pay ſuch debts. But as the time in which debts can be exhibited, is limited by law, the executor

[g] 2 Salk. 522. [h] 2 Bac. Abr. 472, 473. [i] Ibid. 482.

executor may aſcertain the fact before he pays the legacies, which will ſave any trouble of refunding. Legacies are ſaid to be lapſed, contingent, or veſted. A lapſed legacy is where the legatee dies before the teſtator, by which the legacy is loſt, and ſinks into the reſiduum of the eſtate. For a will is of no force, till the death of the teſtator. Of courſe a legacy, cannot veſt till that time, if the legatee dies before the teſtator, the legacy cannot veſt in him, but if he ſurvives him ever ſo ſhort a time, it will veſt, and then deſcend to his heirs.

A contingent legacy is where the bequeſt depends upon the happening of ſome future thing, as a bequeſt to a perſon *if* or when he arrives to the age of twenty-one: if he dies before that time, the contingency on which the legacy was dependent, never happens, and of courſe the legacy is loſt and is called a lapſed legacy.

A veſted legacy is oppoſed to a contingent one, as if a bequeſt is made to a perſon to be paid *when* he arrives to the age of twenty-one. This is a veſted legacy, the intereſt commences inſtantly on the death of the teſtator, tho the payment is to be made at ſome future time, and if the legatee ſurvives the teſtator, tho he dies before he arrives to the age of twenty-one, yet his heirs are entitled to receive it at the time it would have been payable, had he lived. But it is ſaid by the common law, if ſuch legacy be made chargeable on the lands, it ſhall under ſuch circumſtances lapſe for the benefit of the heir.

In caſe of a veſted legacy, which is immediately due, and the payment of which is charged upon lands, or ſome property that gives immediate profit, then intereſt ſhall be paid from the death of the teſtator: but if it be chargeable on perſonal eſtate, then after the executor has had a reaſonable time to pay it. And by the common law, the intereſt commences in a year after the teſtator's deceaſe.

It is the duty of the executor to pay the legacies, unleſs ſome other perſon is ordered to do it by the will. By the common law of England, it is ſaid, that the aſſent of the executor is neceſſary to perfect a legacy. But by our law, no ſuch aſſent is neceſ-

ſary, and as ſoon as a legacy becomes due, action of aſſumpſit will lie in favour of the legatee againſt the executor, for the recovery of it.

When all the debts and particular legacies are paid, then the ſurplus or remainder, goes to the reſiduary legatee, if there be any appointed by the will, but if there be none, then it is conſidered as inteſtate eſtate, and will be divided among the heirs of the teſtator, in the ſame manner as if no will had been made, and of this we are next to treat.

2. I proceed to conſider the title to perſonal eſtate by deſcent, which comprehends the ſettlement of inteſtate eſtates.

By the Engliſh law, the title by deſcent is confined to real, and never applied to perſonal eſtate, becauſe that goes into the hands of the adminiſtrator, and from him to the heirs by a legal diſtribution, different from the deſcent of real eſtates. But as in this ſtate, perſonal eſtate is tranſmitted by deſcent from the anceſtor to the heir, in the ſame manner in caſe he dies inteſtate, as real eſtate, there can be no impropriety, in the application of this term to perſonal eſtate, as it expreſſes the idea with more clearneſs and certainty, than any other term.

A perſon is ſaid to die inteſtate, when he leaves no will, and in that caſe, as he has not ſignified his intention, reſpecting the diſpoſition of his eſtate, the law to preſerve the public peace, points out the mode of ſettling the eſtate, and the perſons to whom it ſhall deſcend.

k When a perſon dies inteſtate, the court of probate ſhall grant adminiſtration of his eſtate to his widow, or the next of kin, or both, and on their refuſal or incapacity, to ſome other perſon, as the court ſhall judge fit: and on granting adminiſtration, ſufficient bond with ſurety, ſhall be taken for a faithful diſcharge of the truſt. When an adminiſtrator is appointed, his power and duty are the ſame with that of an executor, and he is bound to proceed to the ſettlement of the eſtate in the ſame manner. He muſt collect and inventory the eſtate, call in and pay out the debts. The only material

k Statutes, 53.

material difference between theſe offices, ſeems to be this, that if an executor dies, his own executor ſucceeds to his office, and is the executor of the firſt teſtator: but the executor of an adminiſtrator, or the adminiſtrator of an executor, is not the repreſentative of the firſt teſtator; for the power of an executor is founded on the appointment of the teſtator, which evidences a confidence repoſed in him. Such executor may therefore tranſmit his power to his executor. But the adminiſtrator being appointed by the court of probate, no ſuch confidence can be preſumed between him and the inteſtate. Therefore, whenever an adminiſtrator dies, before he has compleatly ſettled the eſtate, or an executor in the ſame circumſtances, leaving no executor, it is neceſſary for the court of probate, to grant new letters of adminiſtration, on the goods not adminiſtered upon, by the former executor, or adminiſtrator: but where an executor dies, leaving an executor appointed by his will, he may by virtue of ſuch appointment, proceed to compleat the ſettlement of ſuch unſettled eſtate.

When the adminiſtrator has collected and diſpoſed of the perſonal eſtate of the inteſtate, if there be not a ſufficiency to pay the debts, the court of probate may order a ſale of lands, ſufficient to pay the debts and incident charges of ſale. When the debts are paid, the adminiſtrator muſt ſettle his account with the court of probate, and of the reſiduum of the perſonal eſtate, if any, a diſtribution muſt be made to the heirs of the inteſtate, unleſs ſuch heirs being legally capable of acting, ſhall make a diviſion among themſelves, and preſent the ſame, in writing under their hands, and ſeals to the court, and acknowledge the ſame before ſuch court or an aſſiſtant, or juſtice of the peace, which voluntary diviſion, ſhall be recorded in the records of the court of probate, and be concluſive on the parties: but if no voluntary diviſion be made, then the court of probate may appoint three ſufficient freeholders, who, under oath, or either two of them, may make a diſtribution of the eſtate.

/ The perſonal eſtate of a man dying inteſtate, is to be diſtributed among his lineal heirs, preciſely in the ſame manner, as real eſtate, and among his collateral heirs, in the ſame manner as real eſtate,

not

/ Statutes, 54.

not received by deſcent, gift, or deviſe, from ſome parent, anceſtor or kindred. But the ſtatute makes this difference in reſpect of the right of the widow, to a portion of the real and perſonal eſtate of the inteſtate. She is entitled to one third of his real eſtate during life, and to one third of his perſonal eſtate forever, if he leaves any children; but if he leaves none, then ſhe is entitled to one half of his perſonal eſtate forever.

The ſtatute law makes proviſion, that if any of the children, in the lifetime of the inteſtate, have any eſtate advanced to them by way of ſettlement, this ſhall be taken into conſideration in the diſtribution, and all the children ſhall be made equal in their ſhares. If any have received their full ſhares, they are entitled to no more, and if any have received only part of their ſhares, they ſhall be made equal with the reſt.

3. Of title by inſolvency. When the eſtate is inſolvent, the ſtatute law has made the following proviſion to ſettle it.

[m] That when the eſtate of any perſon deceaſed ſhall be inſolvent, or inſufficient to pay all the juſt debts, which the deceaſed owed, the ſame ſhall be ſold, and the avails thereof be divided and diſtributed to and among all the creditors, in proportion to the ſums to them reſpectively owing, ſo far as the eſtate will extend, ſaving that the debts due to this ſtate, and for ſickneſs, and neceſſary funeral charges of the deceaſed, are to be firſt paid.

And the executor or adminiſtrator, appointed to adminiſter on any ſuch inſolvent eſtate, before payment be made to any perſon, (except as before excepted) ſhall repreſent the condition and circumſtances thereof unto the judge of the probate of wills and granting of adminiſtrations, who ſhall nominate and appoint two or more fit and indifferent perſons, to make a true and equal appraiſement of ſuch eſtate, and adminiſter the oath by law preſcribed to them for that purpoſe; and ſhall alſo nominate and appoint two or more fit perſons to be commiſſioners, with full power to receive and examine all the claims of the ſeveral creditors, and how they are made out and evidenced; which commiſſioners ſhall be ſworn according to law, and cauſe the times and places of their meetings for attending the creditors, in order for the

[m] Statutes, 105.

the receiving and examining of their claims, to be made known and publiſhed, by ſetting up or poſting notifications thereof in ſome public places in the town where ſuch deceaſed perſon laſt dwelt; and alſo by advertiſing the ſame in one or more of the public news-papers in this ſtate, and any further notice that the court of probate may order: And the ſaid judge of probate ſhall allow ſix, ten or eighteen months, (as the circumſtances of the eſtate may require) for the creditors to bring in their claims and prove their debts: At the end of which time limited as aforeſaid, ſuch commiſſioners ſhall make their report, and preſent a liſt of all claims to ſuch judge, who ſhall order them a meet recompence out of the eſtate, for their care and labour in that affair.

And if on the report of the commiſſioners, ſuch eſtate ſhall appear to be inſolvent, the judge of probate to whom ſuch report is made, ſhall order and ſet out to the widow of the deceaſed, (if any be) ſuch neceſſary houſhold goods as are mentioned in the law, entitled, "*An act for directing and regulating the levying and ſerving Executions*," to be exempted from execution; which goods ſo ſet out, ſhall be her own property. And the judge ſhall order the widow's dower to be ſet out according to law. And the reſidue and remainder of ſaid eſtate, both real and perſonal, (including that ſet out for the widow's dower, and under the incumbrance of her holding it for life) the judge of probate ſhall order and direct the executor or adminiſtrator, or executors or adminiſtrators, appointed to adminiſter on ſuch eſtate, to ſell in ſuch way and manner as to the judge ſhall appear ſafeſt and moſt for the benefit of the creditors. And ſuch executors and adminiſtrators being ſo ordered and directed, ſhall have full power and authority, and they are hereby authoriſed and impowered to make ſale thereof, and to make and execute legal and proper conveyances to the purchaſers, which ſhall be good evidence in law for their holding the ſame accordingly. And ſuch ſales being made, the ſaid executors and adminiſtrators ſhall render account to the judge of probate of the amount thereof, and the monies ariſing thereby. And the judge ſhall thereon order full payment to be made of the debts due to this ſtate, and for ſickneſs, neceſſary funeral expences

and

and incident charges of ſettling and ſelling the eſtate. And the reſidue to be paid to the ſeveral creditors who have made out and evidenced their claims according to the directions of this act, as aforeſaid, in proportion to the ſums to them reſpectively owing.

Provided always, That notwithſtanding the report of any ſuch commiſſioners or allowances thereof made by the court of probate, it ſhall and may be lawful to, and for the executors and adminiſtrators aforeſaid, to conteſt the proof of any debt at the common law.

And no proceſs in law (except for debts due to this ſtate, and for ſickneſs and funeral charges) ſhall be admitted or allowed againſt the executors or adminiſtrators of any inſolvent eſtate, ſo long as the ſame ſhall be depending as aforeſaid.

And in caſe judgment ſhall be rendered againſt any executors and adminiſtrators of any inſolvent eſtate, execution thereon ſhall be ſtayed until ſuch eſtate can be ſettled according to this act: And the judgment creditor ſhall take no more than his proportion of the ſaid inſolvent eſtate with the other creditors; and in caſe that be not paid on the ſettlement of the eſtate, ſuch creditor ſhewing the ſame, and producing a certificate of his proportion, the court ſhall order execution on ſuch judgment for no more than the proportion aforeſaid.

And whatſoever creditior ſhall not make out his or her claims with ſuch commiſſioners, before the full expiration of the time ſet and limited for that purpoſe, as aforſaid, ſuch creditor ſhall forever after be debarred of his or her debt; unleſs he or ſhe can ſhew or find ſome other or further eſtate of the deceaſed, not before diſcovered and put into the inventory.

The executor or adminiſtrator, at any time in the courſe of the adminiſtration of the eſtate, when he diſcovers it to be inſufficient to pay the debts, may repreſent it to be inſolvent.

It has been adjudged, that a creditor to any amount cannot be a commiſſioner, that while the commiſſioners are acting within their power, and duty, no appeal can lie from the decree of the court of probate accepting of their report: and that their juriſdiction is final as it reſpects the creditors. It has alſo been adjudged

adjudged, that where commiſſioners exceeded their juriſdiction, as where they took into conſideration matters ariſing after the deceaſe of the inteſtate, that an appeal would lie: where the commiſſioners charged the claimant with the rents of land of the inteſtate, ariſing after his death, againſt a debt due antecedent to his death; and where they allowed the adminiſtrator his expenſes for ſupporting the children of the deceaſed, after his death. *n* It has been adjudged, that an appeal will lie in favour of heirs and legatees from the decree of a court of probate, accepting the report of commiſſioners allowing a debt to the adminiſtrator; becauſe there is no perſon to conteſt ſuch debt at law, as there is in the caſe of creditors, for the adminiſtrator, who alone can conteſt debts, will not conteſt his own debt.

o Where there are mutual debts between the deceaſed, who died inſolvent, and a creditor, they muſt be offsett: and this may be done by the commiſſioners. The executor or adminiſtrator cannot retain a note and collect the whole, ſo as to ſubject the creditor by book, to take his average, and in caſe they refuſe to make the offsett, they may be compelled by a court of chancery: *p* and on the queſtion of allowing to apply on the note, a ſum found due by commiſſioners, the adminiſtrator or executor, may conteſt the allowance of the debt. If they ſhould put ſuch debt in ſuit, the court before whom action is brought, may apply the ſum allowed by the commiſſioners, in payment of the debt. *q* If they collect ſuch debt, a court of chancery will decree the payment of the ſum which ought to have been offsett.

r Action on note was brought againſt an executor, who pleaded the inſolvency of the eſtate, to which the plaintiff replied the diſcovery of eſtate not inventoried, but on demurrer, the court held that a general action in ſuch caſe is not maintainable; but a ſpecial action adapted to the nature of the caſe.

ſ The executor or adminiſtrator are not reſponſible for the rents and profits of the real eſtate of the deceaſed, before it was repreſented inſolvent, becauſe it goes by law to the heirs or deviſees; but they are accountable after the repreſentation of inſolvency.

n Staniford, &c. vs. Hyde, S. C. 1791. Fairwether vs. Curtice, S. C. 1793. *o* Hoſmer vs. Brattle, S. C. 1791. *p* Hoſmer vs. Merriam, S. C. 1792. *q* Roſe vs. Clark, & Wife, S. C. 1790. *r* Jones's Ex'r. vs. Levenworth, S. C. 1789. *ſ* Storer vs. Hinkley, S. C. 1790.

CHAPTER TWENTY-EIGHTH.

OF INCORPOREAL PROPERTY.

INCORPOREAL property has already been defined to be an ideal right, iſſuing out of ſubſtantial corporeal things, either real or perſonal. In England there are ſeveral things which are claſſed under this deſcription: but in this ſtate, there is no right which can ſtrictly be called incorporeal, but the right of ways: which is a privilege that one has to paſs through the land of another. This right may be created in two ways, by preſcription, and by grant. Grants may be expreſs or implied. An expreſs grant is where the proprietor of land by deed, conveys to another the right of paſſing over his land: or it may be grounded on a ſpecial permiſſion, or licence, as where the owner of lands, grants to another the liberty to paſs over them to go to mill or to market, or the like. In this caſe the right is confined to the grantee alone, and cannot be aſſigned. [u] Grants are alſo implied by operation of law. If a man conveys to me a piece of land, which I cannot approach without paſſing through his other lands,—as a piece in the middle of his field, he at the ſame time, impliedly gives me a way to it, and I may croſs his other land for that purpoſe: for it is a general maxim, that when the law giveth to one any thing, it giveth impliedly whatever is neceſſary to enjoy the ſame.

A right of way by preſcription, is where the inhabitants of a town or village, or the owners or occupiers of a certain farm, have immemorially uſed to croſs ſuch a ground, for a particular purpoſe. This immemorial uſage ſuppoſes an original grant, which creates a right of way. Such is the common law: but this country has been ſo lately ſettled, that the right of preſcription, has hardly had time to operate.

APPENDIX.

[t] 2 Black. Com. 35. [u] Co. Lit. 56.

APPENDIX.

CONTAINING FORMS AND PRECEDENTS.

DEED.

KNOW To all People to whom theſe Preſents ſhall come Greeting. Ye, that For the conſideration of received to my full ſatisfaction, of Do give, grant, bargain, ſell and confirm unto the ſaid To have and to hold the above granted and bargained Premiſes, with the Appurtenances thereof, unto the ſaid Heirs and Aſſigns forever, to and their own proper Uſe and Behoof. And alſo, the ſaid Do for ſel Heirs, Executors and Adminiſtrators, covenant with the ſaid Heirs and Aſſigns, that at and until the enſealing of theſe Preſents, well ſeized of the Premiſes as a good indefeaſible Eſtate in Fee Simple; and have good Right to bargain and ſell the ſame in Manner and Form as is above written; and that the ſame is free of all Incumbrances whatſoever. And furthermore the ſaid do by theſe Preſents bind ſel Heirs, forever to Warrant and defend the above granted an bargained Premiſes to the ſaid Heirs and Aſſigns, againſt all Claims and Demands whatſoever. In witneſs whereof have hereunto ſet Hand and Seal the Day of *Anno Domini* 179

Signed, ſealed and delivered,
in Preſence of

WRIT of SUMMONS.

To the Sheriff of the county of H—his deputy, or to either of the Conſtables of the town of G—in ſaid county Greeting. By authority of the State of Connecticut, you are hereby commanded to ſummon A. B. of ſaid G—to appear before the Court of Common Pleas to be holden at H—on the Tueſday of then and there to anſwer unto C. D. of W—in a plea of which is to the damage of the Plaintiff the ſum of lawful money, and to recover the ſame with coſt, the Plaintiff brings this ſuit. Fail not, and make lawful ſervice and return. Dated at juſtice of Peace.

WRIT of ATTACHMENT.

To the Sheriff of the county of H—his deputy, or to either of the conſtables of the town of G—in ſaid county Greeting. By authority of the State of Connecticut, you are hereby commanded to attach the goods, or eſtate of A. B. in ſaid G—to the value of lawful money, and for want thereof attach his body, and him have to appear before the Court of to be holden at on the day of then and there to anſwer unto C. D. of ſaid G— in a plea of which is to the damage of the Plaintiff lawful money and to recover the ſame with coſt, the Plaintiff brings this ſuit. Bonds for proſecution are given. Fail not, and make lawful ſervice and return. Dated at

DECLARATIONS.

ASSAULT and BATTERY.

In a plea of treſpaſs, whereupon the plaintiff declares and ſays, that on or about the day of at the defendant with force and arms, did an aſſault make upon the body of the plaintiff, and did him beat and ſtrike many blows whereby he was much wounded, and greatly injured, to his damage

Information QUI TAM for an ASSAULT and BATTERY; and Warrant.

To A. B. Esquire, Justice of the Peace for the county of H—comes C. D. of E—and complains and informs as well in the name of the State of Connecticut as in his own name, that F. G. of on the day of at with force and arms did an assault make upon the body of the complainant, and did him beat, and strike many blows:—which doings of the said F. G. are against the peace, and contrary to the statute in such case provided, and to the damage of the complainant lawful money. Dated at C. D.

To the Sheriff &c. By authority of the State of Connecticut, you are hereby commanded forthwith to arrest the body of the above named F. G. of and him bring before me the subscriber a justice of the peace for said county of at then and there to answer to the matters contained in the foregoing complaint of C. D. and be therein dealt with according to law. Bonds for prosecution are given. Fail not &c.

SLANDER.

In a plea of the case, whereupon the plaintiff declares and says, that from his youth to the present time, he has ever sustained a good character, and has never been guilty of the crime of theft, yet the defendant minding and intending to injure and destroy the character of the plaintiff, did on at maliciously, falsely, and openly, utter and publish in the hearing of sundry citizens of this state, the following false, and scandalous words of and concerning the plaintiff, (viz.) A. B. (meaning the plaintiff) is a thief and has stolen my horse (meaning the defendant's horse) and the plaintiff says that by reason of the defendant's speaking said words, he has been greatly injured in his good name and reputation, has been put to great trouble and expense and exposed to a criminal prosecution for the crime of theft, which is to his damage.

FALSE-IMPRISONMENT.

In an action of trespass, whereupon the plaintiff declares and says, that the defendant on at did with force and arms an assault make upon the body of the plaintiff, and him did beat and wound, and unlawfully imprison, and detained and confined him in prison for the space of twenty-four hours, and then and there did to him many other injuries, against the peace and to his damage.

MALICIOUS PROSECUTION.

In a plea of the case, whereupon the plaintiff declares and says, that he has from his youth to the present time, sustained a good character, and has never been guilty of perjury, of which the defendant was not ignorant, but contriving and maliciously intending to injure the character of the plaintiff, and bring him to public scandal and disgrace, did falsely and maliciously and without any reasonable, or probable cause whatever, on the day of cause and procure the plaintiff to be informed against, and indicted for the crime of perjury, [illegible] manner *(recite the information or indictment with the whole [illegible])* And the plaintiff says that he was innocent of [illegible] said information, yet the defendant well knowing [illegible] of the plaintiff, but intending to injure him did falsely, [illegible] any reasonable or probable cause whatever, [illegible], and procure the plaintiff to be informed against, indicted and prosecuted for the crime of perjury as aforesaid, whereby the plaintiff has been greatly injured in his reputation, and has been put to great trouble and cost in his necessary defence. To his damage.

TRESPASS for DEBAUCHING the PLAINTIFF's DAUGHTER.

In an action of trespass, whereupon the plaintiff declares and says, that the defendant on the day of and at divers other times since, did with force and

and arms break and enter into the houſe of the plaintiff, and aſſaults make upon the body of A. B the plaintiff 's ſervant and daughter, under the age of twenty one years; and the defendant did then and there ſeduce and debauch the ſaid A. B. and carnally know her, and get her with child. By which the plaintiff loſt the company and ſervice of his ſaid ſervant and child for a long time, viz. from and was put to great labour and trouble, and was forced to expend one hundred pound in maintaining and taking care of her lying in of ſaid child, to his damage.

CASE for DEBAUCHING the PLAINTIFF's DAUGHTER.

In a plea of treſpaſs on the caſe, whereupon the plaintiff declares and ſays, that the defendant on the day of at contrary to the mind and will of the plaintiff did enter his houſe, and then and there ſeduced, debauched and carnally knew A B. his daughter, who lived with the plaintiff and depended on him for her ſupport: and the defendant begot the ſaid A. B. with child; by which the plaintiff loſt the comfort and ſervice of his ſervant and child for a long time, viz. from and was put to great labor and trouble and expended one hundred pounds lawful money in maintaining and taking care of her, in her lying in of ſaid child, and during her ſickneſs, to his damage

DISSEISIN.

In a plea that to the plaintiff the defendant render the ſeiſin and peaceable poſſeſſion of a certain tract or parcel of land, lying in and butted, bounded and deſcribed as follows containing about acres of which tract or parcel of land, the plaintiff on or about the day of was well ſeized and poſſeſſed in his own right in fee, and ſo continued thereof poſſeſſed, until on or about the day of when the defendant without law or right, and contrary to the mind and will of the plaintiff thereinto entered, and ejected the plaintiff therefrom, and ever ſince has, and ſtill doth continue to deforce and hold the plaintiff out of the premiſes, taking the whole profits to himſelf, which is to the damage of the plaintiff the ſum of wherefor the plaintiff brings this ſuit, and demands of the defendant, the ſurrendry and quiet poſſeſſion of the premiſes, together with ſaid damages and coſt of ſuit.

PARTITION.

In a plea that the defendant do appear, divide, and ſet out to the plaintiff one moiety, or half part of a certain tract of land, containing acres, with the buildings thereon, lying in and butted, bounded, and deſcribed as follows—Whereupon the plaintiff declares, and ſays, that he, and the defendant hold ſaid tract of land together, and undivided, as tenants in common, in ſuch manner and proportion, that it belongs to the plaintiff to have, and to hold in ſeveralty one half part of the premiſes, and that he has a right to have his ſaid proportion, and part ſet out by proper metes, and bounds, and to hold the ſame in ſeveralty, but the defendant always has, and ſtill does refuſe to have the ſame ſet out, and apparted to the plaintiff, or to ſuffer the plaintiff to hold the ſame in ſeveralty, tho often requeſted, and demanded—which is a damage to the plaintiff, the ſum of for which, and for coſts, and to obtain partition of ſaid deſcribed premiſes, the plaintiff brings this ſuit.

TRESPASS.

In an action of treſpaſs, whereupon the plaintiff declares, and ſays, that on the day of he was, and ever ſince has been, lawfully ſeized and poſſeſſed of a certain tract of land, lying in butted, and bounded, and deſcribed as follows and the plaintiff ſays that on the day of the defendant did with force, and arms break, and enter into, and upon ſaid deſcribed tract of land of the plaintiff, and did tread down, conſume and deſtroy the herbage then and there growing, and did cut down one hundred trees, then, and there ſtanding, and growing, to the damage of the plaintiff.

Where

Where the damage is done by cattle, the declaration muſt charge the defendant with breaking into, and entering upon the land of the plaintiff, and treading down, and deſtroying the graſs, and herbage with his cattle, viz. horſes, oxen, ſheep, &c.

TRESPASS with reſpect to THINGS PERSONAL.

In an action of treſpaſs, whereupon the plaintiff declares, and ſays, that on the day of he was the lawful owner of a certain bay horſe, ſix years old, of the price and value of thirty pounds lawful money, and the defendant on ſaid day, did with force, and arms, take and carry away ſaid horſe out of the poſſeſſion of the plaintiff, to ſome place unknown, whereby the plaintiff has wholly loſt the ſame, to his damage.

In an action of treſpaſs, whereupon the plaintiff declares, and ſays, that the defendant, on the day of at did with force, and arms break into the dwelling houſe of the plaintiff, and did him aſſault, and beat, and unlawfully impriſon for the ſpace of twenty four hours, and did with force take, and carry away his goods, and chattels, viz. one thouſand hats of the price, and value of one thouſand dollars, &c. whereby the plaintiff loſt the ſame, to his damage.

TROVER.

In a plea of the caſe, whereupon the plaintiff declares, and ſays, that on the day of he was poſſeſſed of ten yards of broad-cloth, of the value of ten pounds lawful money, which was his own proper eſtate, and being ſo thereof poſſeſſed, he afterwards on the day of loſt ſaid broad-cloth, out of his hands, and poſſeſſion, which afterwards on the day of came into the hands and poſſeſſion of the defendant, by finding: and the plaintiff ſays, that the defendant well knew that the ſaid cloth belonged to the plaintiff, but contriving, and intending to deceive, and defraud him, he the defendant has at all times neglected and refuſed to deliver ſaid cloth to the plaintiff, tho often requeſted, particularly on the day of and the defendant afterwards on the day of converted, and diſpoſed of the ſame, to his own uſe, to the damage of the plaintiff.

DEBT.

In a plea that to the plaintiff, the defendant render the ſum of lawful money which he juſtly owes, and unjuſtly detains, whereupon the plaintiff declares and ſays, that the defendant in and by a certain writing, or bond obligatory, under his hand, and ſeal, by him well executed dated the day of acknowledged himſelf holden, and firmly bound, and obliged unto the plaintiff, in the ſum of to be paid in a reaſonable time, when thereto requeſted, as by ſaid writing, or bond obligatory ready in court to be ſhewn appears: which debt the defendant has never paid, tho often requeſted and demanded, and tho reaſonable time has accrued—to the damage of the plaintiff.

COVENANT.

In a plea of covenant broken, whereupon the plaintiff declares, and ſays, that on the day of for the conſideration of he purchaſed of the defendant a certain tract of land, lying deſcribed as follows: and that the defendant on the day aforeſaid, made, executed, and delivered to the plaintiff a deed of conveyance of ſaid lands, in which among other things, the defendant covenanted with the plaintiff, that at, and until the enſealing of ſaid deed, he the defendant was well ſeized of the premiſes, as a good indefeaſible eſtate in fee—as by ſaid deed ready in court to be ſhewn, appears. Now the plaintiff ſays, that at the time of executing ſaid deed, the defendant was not well ſeized of the premiſes, as an eſtate in fee, and

that

that he was not the owner of ſaid land, but the ſame belonged to C. D. and thereupon the plaintiff ſays that the defendant his ſaid covenant not regarding has wholly failed to keep, and perform the ſame, tho often requeſted, but has broken the ſame, and refuſed, and ſtill does refuſe to keep the ſame, to the damage of the plaintiff.

ACCOUNT.

In a plea that to the plaintiff, the defendant render his reaſonable account, during the time in which he was the plaintiff's bailiff and receiver, whereupon the plaintiff declares and ſays, that from the day of till the day of the defendant was the bailiff and receiver of the plaintiff, and did during that time, receive of the plaintiff divers goods and merchandize, viz. to ſell and diſpoſe of, to merchandize with, and make profit thereof, and to render his reaſonable account thereof to the plaintiff when he ſhould afterwards be thereto requeſted: yet the plaintiff ſays, that the defendant has hitherto refuſed and ſtill does refuſe to render his reaſonable account thereof, tho often requeſted, which is to the damage of the plaintiff the ſum of and to recover the ſame, and that the defendant render his reaſonable account, during the time he was bailiff and receiver as aforeſaid, the plaintiff brings this ſuit.

ASSUMPSIT.

In a plea of the caſe, whereupon the plaintiff declares and ſays that on the day of the defendant was juſtly indebted to the plaintiff, in the ſum of one hundred pounds lawful money, for money he the defendant before that time had received, to the uſe of the plaintiff, and being ſo indebted, the defendant in conſideration thereof, afterwards on the day of aſſumed upon himſelf, and well and faithfully promiſed the plaintiff, to pay to him ſaid ſum of one hundred pounds lawful money, in a reaſonable time then afterwards, when thereto requeſted; nevertheleſs the plaintiff ſays, that the defendant his ſaid promiſe not regarding, hath never performed the ſame tho often requeſted, and tho a reaſonable time hath long ſince accrued, to the damage

Whereupon the plaintiff declares and ſays that on the day of the defendant was juſtly indebted to the plaintiff in the ſum of one hundred pounds lawful money for money before that time laid out and expended for the defendant, at his ſpecial inſtance and requeſt— or lent and advanced for him at his ſpecial inſtance and requeſt— or for goods ſold and delivered, *(as the caſe may be)* and being ſo indebted, &c.

In a plea of the caſe, whereupon the plaintiff declares and ſays that on the day of the plaintiff and defendant came to a ſettlement and adjuſtment of accounts before that time ſubſiſting between them, and there was found due from the defendant, on the account ſo ſtated, to the plaintiff, a balance of ten pounds lawful money, and the defendant being in arrear to the plaintiff ſaid ſum of ten pounds lawful money, he did on the day aforeſaid, in conſideration thereof aſſume, &c.

In a plea of the caſe whereupon the plaintiff declares and ſays, that on the day of he was the lawful proprietor of a certain tract of land, lying containing acres and is deſcribed as follows and the plaintiff ſays that on the day of at the ſpecial inſtance and requeſt of the defendant, he permitted the defendant to enter into poſſeſſion of the premiſes, and the defendant held, and occupied the premiſes for the ſpace of one year afterwards, taking the whole profits to himſelf; and the defendant in conſideration thereof, afterwards, on the day of aſſumed on himſelf, and well and faithfully promiſed the plaintiff to pay to him ſo much money as he therefor reaſonably deſerved to have, in a reaſonable time when thereto requeſted, and the plaintiff ſays that he therefor, reaſonably deſerved to have one hundred pounds lawful money, of which the defendant had notice, yet the plaintiff ſays that the defendant his ſaid promiſe not regarding hath never performed the ſame &c.

BOOK DEBT.

In a plea that to the plaintiff the defendant render the ſum of lawful money, which to the plaintiff the defendant juſtly owes by book, to balance book accounts as by the plaintiff's book ready in court to be produced appears, which debt the defendant hath never paid tho often requeſted, &c.

SCIRE FACIAS.

To the ſheriff. &c. Whereas, A. B. of brought his action of debt, to the court of common pleas, holden at againſt C. D. of an abſent and abſconding debtor, by writ, bearing date day of demanding ten pounds lawful money, which writ was duly ſerved on ſaid C. D. and alſo a true and atteſted copy thereof, with the officer's doings thereon, was left with E. F. of attorney and debtor to ſaid C. D. more than fourteen days before the ſitting of ſaid court, to which ſaid writ, being duly ſerved, was returned, and by legal removes, ſaid action came to the court of common pleas, holden at on the day of when and where, the plaintiff recovered judgment againſt the ſaid C. D. for the ſum of and coſt of ſuit and thereupon took out execution, for the ſums aforeſaid, with one ſhilling more for ſaid execution, in due form of law, which execution was dated, and ſigned by clerk of ſaid court, and directed to the ſheriff of the county of to ſerve and return, which execution was put into the hands of ſheriff of ſaid county, who on the day of made return thereof with his indorſement thereon, that he had made diligent ſearch and enquiry after the perſon and eſtate of C. D and could find neither, and that on the day of he made demand of E F attorney and debtor to ſaid C. D of the ſums contained in ſaid execution, and that he refuſed to pay the ſame, or ſhew any eſtate of the ſaid C. D whereupon ſaid execution could be levied. Fees As by the files and records of ſaid court and ſaid execution with the indorſement thereon may appear. And now the plaintiff ſays that ſaid E. F. at the time the copy of ſaid writ was left with him, was juſtly indebted to ſaid C. D. in a greater ſum than the amount of ſaid judgment and execution, with the officers fees thereon: yet the defendant would not expoſe or diſcover any eſtate whereon ſaid execution might be levied, nor pay the ſame or any part thereof, whereby the defendant has become liable in law to pay the ſame, out of his own eſtate, as his own proper debt: and the plaintiff ſays, that ſaid judgment has never been reverſed, nor has the ſame and the officers fees ever been paid, but are now due.

Theſe are therefore by the authority of the State of Connecticut, to require you to make the ſaid E F. to know, that he appear before the court of common pleas, to be holden at on then and there to ſhew reaſons if any he have, why judgment ſhould not be had and rendered in favour of the plaintiff againſt the ſaid E F. for the amount of ſaid judgment and execution, and officers fees, and the coſts of this ſuit, as his own proper debt, to be paid out of his eſtate, and that execution ſhould be iſſued againſt him accordingly. Fail not &c.

ACTION on STATUTE.

In an action bought on a certain ſtatute law of this ſtate, entitled an act for detecting and puniſhing treſpaſſes in divers caſes, and directing proceedings therein: whereupon the plaintiff declares and ſays, that by ſaid ſtatute it is enacted *(recite the firſt paragraph)* Now the plaintiff ſays, that on the day of he was well ſeized and poſſeſſed of a certain tract or piece of land lying in and deſcribed as follows, and that the defendant on the day of did with force and arms, break into and enter upon ſaid tract of land, and did then and there cut down ten trees of a greater dimenſion than one foot diameter, and the ſame carry away to ſome place unknown, and the plaintiff ſays that the defendant by force of ſaid ſtatute, has forfeited and become liable to pay to the plaintiff ten ſhillings lawful money for each of ſaid trees, and three times the value of ſaid trees, and the plaintiff ſays that ſaid trees were well worth three pounds lawful money, and that the defendant

ant has forfeited and become liable to pay to the plaintiff the ſum of fourteen pounds lawful money, being ten ſhillings for each tree, and three times the value thereof, and that a right of action by force of ſaid ſtatute has accrued to the plaintiff to recover the ſame of the defendant with coſt, and to recover the ſame with coſts the plaintiff brings this ſuit.

Then and there to anſwer unto A. B. of in an action brought on a certain ſtatute law of this ſtate, entitled an act concerning leather, and for regulating the ſeveral artificers concerned in working, or making up the ſame, who ſues, and brings this action as well in the name of the ſtate of Connecticut, as in his own name, whereupon the plaintiff declares, and ſays, that in and by ſaid ſtatute among other things is enacted, [*recite ſtatute paragraph*] Now the plaintiff ſays, that the defendant diſregarding the penalties of ſaid ſtatute, did on the day of in erect, ſet up, and make tan vats to tan in, and did carry on the trade, and myſtery of tanning leather, and has ever ſince kept up ſaid vats, and uſed ſaid trade, and the plaintiff ſays, that the defendant has never applied to the court of common pleas in ſaid county, and has never obtained any licence to ſet up, and manage the trade of tanning leather, which doings of the defendant are contrary to ſaid ſtatute, and the plaintiff ſays that he the defendant has forfeited the ſum of twenty pounds lawful money, one moiety to the treaſury of the county aforeſaid, and the other moiety to the plaintiff, and that a right of action by force of ſaid ſtatute has accrued to him, to recover the ſame, for the uſes aforeſaid, and to recover the ſame with juſt coſt, the plaintiff brings this ſuit.

ACTION on ORDER, or INLAND BILL, refuſed to be ACCEPTED.

In a plea of the caſe, whereupon the plaintiff declares and ſays, that on the day of the defendant was juſtly indebted to the plaintiff by book in the ſum of ten pounds lawful money, and in conſideration and ſatisfaction thereof the defendant made, executed and delivered to the plaintiff a certain writing or order in the words following. To A. B. for value received, pay C D. ten pounds lawful money and charge to account of E. F. As by ſaid order or writing ready in court to be produced appears, which order the plaintiff accepted in diſcharge of ſaid debt, and on the day of offered and preſented the ſame to ſaid A. B. for acceptance and payment, and the ſaid A. B. then refuſed to accept and pay the ſame of all which, the defendant afterwards on the day of had notice: and thereupon the plaintiff ſays that the defendant by reaſon of the premiſes, became juſtly indebted to him in the ſum of ten pounds lawful money, and being ſo indebted, he did in conſideration thereof aſſume upon himſelf, and well and faithfully promiſe the plaintiff, to pay to him ſaid ſum of ten pounds lawful money, in a reaſonable time when requeſted.

WARRANTY.

In a plea of the caſe whereupon the plaintiff declares and ſays, that on the day of he purchaſed of the defendant, a certain horſe and paid him therefor, the valuable conſideration of thirty pounds lawful money, and the plaintiff ſays, that at the time of the ſale and delivery of ſaid horſe, the defendant did affirm, declare, and warrant to the plaintiff, that the ſame was ſound, wind and limb, and free from any defect or diſeaſe whatever, and the plaintiff ſays that at the time of ſaid ſale, delivery and warranty of ſaid horſe, the ſame was diſordered and defective, and for a long time before, and then had a certain incurable diſeaſe, called ——whereby ſaid horſe was rendered of no value, and the plaintiff has wholly loſt the ſame: and the plaintiff ſays that the defendant has not kept his ſaid warranty, but has broken the ſame, to his damage, &c.

FRAUD.

In a plea of the caſe, whereupon the plaintiff declares and ſays, that on the day of he purchaſed of the defendant a certain horſe—and paid him therefor the valuable conſideration of thirty pounds lawful money, and the

plaintiff ſays, that he purchaſed ſaid horſe as, and for a ſound horſe, and that the defendant at the time of ſaid ſale and delivery, did affirm and declare to the plaintiff, that ſaid horſe, was ſound wind and limb, and free from any defect or diſeaſe whatever. And the plaintiff further ſays, that at the time of ſaid ſale and delivery, ſaid horſe was unſound, and then and for a long time before, had an incurable diſeaſe, called——which was then well known to the defendant, but wholly unknown to the plaintiff: and that ſaid diſeaſe has rendered ſaid horſe of no value, and that the plaintiff has wholly loſt the ſame, to his damage, &c.

AUDITA QUERELA.

To the honorable——Eſquire, judge of the court of common pleas, in the county of A. B. of complaint makes, and gives your honour to underſtand, that E. D. of brought his action on the caſe againſt the complainant, before the court of common pleas, holden at on the day of demanding lawful money damages. At which court, the ſaid C. D. recovered judgment againſt the complainant, for the ſum of debt, and coſt, and took out execution therefor, and on the day of the complainant paid to the ſaid C. D. the full ſum of ſaid judgment and execution, and all coſt; nevertheleſs the ſaid C. D. immediately put ſaid execution into the hands of the ſheriff of ſaid county, who now holds the ſame and threatens to levy the ſame upon the perſon or eſtate of the complainant: and the complainant has no day in court to plead the matters aforeſaid, and is grievouſly injured in the premiſes, whereupon he prays that ſaid execution may be ſtayed, and that the ſaid C. D. may be ſummoned to appear before the next county court, to be holden at then and there to ſhew reaſon, if any he have, why he ſhould not be ſtayed from proceeding any further with ſaid execution, and that all proceedings on the ſame may be ſtayed till the ſame be determined. Dated, &c.

To the ſheriff, &c. By authority of the ſtate of Connecticut, you are hereby required to cauſe the ſaid C. D. in the foregoing complaint, to know that he proceed no further with ſaid execution in ſaid complaint mentioned, but that he ſtay the ſame until the matter mentioned in ſaid complaint ſhall be heard by ſaid county court, according to the requeſt of ſaid complainant, and you are to ſummmon the ſaid C. D. to appear before the county court to be holden at then and there to anſwer to the matters contained in the ſaid complaint, and to do and ſuffer what upon a hearing of ſaid cauſe ſhall be adjuged by ſaid court in the premiſes. Fail not &c.

WRIT of ERROR.

To appear before the honorable ſuperior court to be holden then and there to hear read, the proceſs, record and judgment of the court of common pleas holden at in an action wherein the ſaid was plaintiff, and was defendant, and the errors therein aſſigned, and to do and ſuffer what by ſaid ſuperior court ſhall be enjoined in ſaid cauſe. Whereupon the plaintiff in error declares and ſays, that the ſaid brought forward to the court of common pleas, holden his action in the following manner, (*recite the whole proceſs and proceedings in the action*) as by the files and records of ſaid court of common pleas ready in court to be produced, fully appears Now the plaintiff in error complains and ſays, that ſaid court of common pleas in proceeding to, and rendering ſaid final judgment, manifeſtly erred and miſtook the law, and for cauſe of error eſpecially aſſigns whereupon the plaintiff prays, that ſaid erroneous judgment may be reverſed and ſet aſide, and he be reſtored to all that he has loſt thereby, which is not leſs than lawful money, and to recover ſaid damages and reverſe ſaid judgment, the plaintiff brings this ſuit. Fail not &c.

PLEADINGS.

CASE.

In a plea of the caſe whereupon the plaintiff declares and ſays, that the defendant, in and by a certain writing or note, under his hand, by him well executed

ecuted, dated the day of promiſed the plaintiff for value received to pay to him the ſum of ten pounds lawful mney, on demand with intereſt, as by ſaid writing or note ready in court to be produced appears. And the plaintiff ſays that the defendant his promiſe aforeſaid not regarding, hath never performed the ſame, tho often requeſted &c.

John Doe. vs. Richard Roe. } PLEA in BAR. Court of common pleas,—W.—county, Dec. term— Action on caſe———

And now the defendant defends, pleads and ſays, that the plaintiff of having and maintaining his action, ought to be barred, becauſe, he ſays tho true it is that he executed the note on which, &c. yet he further ſays, that on the day of he did offer and tender to the plaintiff, the ſum of ten pounds lawful money, which was the full ſum due on ſaid note, in full payment thereof, which the plaintiff then refuſed to accept and receive, and ſtill does refuſe to receive the ſame, and the defendant ſays that he has always ſtood ready to pay ſaid ſum to the plaintiff, and yet is ready, and now offers and tenders the ſame in court; which the defendant is ready to prove, and thereof prays judgment.

REPLICATION.

The plaintiff replies to the plea in bar of the defendant, and ſays, that he ought not to be barred, any thing therein contained, notwithſtanding, becauſe he ſays, that tho true it is, that the defendant did, on ſaid day offer and tender to the plaintiff ſaid ſum of ten pounds, in full payment of the note, on which, &c. and that the plaintiff refuſed to accept, and receive the ſame, yet he further ſays, that afterwards, on the day of he the plaintiff did make demand of the defendant of ſaid ſum of ten pounds due by the note, on which, &c. and tendered as aforeſaid, which the defendant then refuſed and neglected to pay, which the plaintiff is ready to verify, and thereof prays judgment.

REJOINDER.

The defendant rejoins to the reply of the plaintiff, and ſays he ought not to be barred, becauſe he ſays, tho true it is, that the plaintiff on ſaid day of made demand of the ſum due by the note on which &c. and tendered as aforeſaid, yet he further ſays, that he did on ſaid day of offer and tender to the plaintiff, ſaid ſum of ten pounds tendered as aforeſaid, which he is ready to prove, without that, that the defendant then refuſed and neglected to pay to the plaintiff, ſaid ſum of ten pounds lawful money, due by the note on which &c. and tendered as aforeſaid, in manner and form as the plaintiff in his reply hath alledged, and thereof prays judgment.

SURREJOINDER.

The plaintiff ſurrejoins to the rejoinder of the defendant, and ſays, he ought not to be barred, becauſe he ſays, that on the day of he did make demand of the defendant, of the ſum due by note on which &c and tendered as aforeſaid, which the defendant then refuſed and neglected to pay, in in manner and form as the plaintiff in his reply has alledged, and thereof puts himſelf on the country.

REBUTTER.

And the plaintiff likewiſe.

JUDGMENT.

At a court of common pleas holden at——

John Doe, of ——— Plaintiff.
Richard Doe, of ——— Defendant.

In a plea of the caſe on note, demanding lawful money damages, with coſt of ſuit, as per writ on file dated This action was brought to and by legal removes, comes to this term. Now the parties appeared, and are at iſſue, as on file. The caſe with the evidences, being committed to the jury, they brought in the following verdict, viz. "In this caſe the jury find,

" that the plaintiff on the day of did make demand of the defendant " of the ſum due by the note on which &c. and tendered as aforeſaid, which " the defendant neglected and refuſed to pay, in manner and form as the " plaintiff in his reply and rejoinder has alledged, and therefore find for the " plaintiff to recover of the defendant damages together with his coſt." This court accept the verdict of the jury, and thereupon conſider that the plaintiff recover of the defendant lawful money damages, and his coſt of ſuit taxed at

INFORMATION by GRANDJURORS.

BREACH of PEACE.

To A. B. juſtice of the peace for the county of C. comes E. F. of G. a grandjuror in ſaid town of G—and to your worſhip on oath complains and informs, that H. I. of ſaid G—did at on or about with force and arms, an aſſault make upon the body of K. L. of and did him, beat and ſtrike many blows, by which he was greatly hurt and wounded, which doings of the ſaid H. I. are againſt the peace, and contrary to the ſtatute, in ſuch caſe made and provided. E. F. Grandjuror.

WARRANT.

To the ſheriff, &c. By authority of the State of Connecticut you are hereby commanded forthwith to arreſt the body of H. I of and him bring before me the ſubſcriber a juſtice of the peace for the county of at then and there to anſwer unto the matters contained in the foregoing complaint of E. F. grandjuror, and thereon be dealt with according to law. Fail not &c.

THEFT.

——Complains and informs, that A. B. of did in on the day of feloniouſly take, ſteal, and carry away a certain (*deſcribe the thing ſtolen*) of the price and value of the proper eſtate of E. F. which doings of the ſaid A. B. are againſt the peace and contrary to the ſtatute in ſuch caſe made and provided.

PETITION in EQUITY.

To the honorable ſuperior court of the State of Connecticut, to be holden at The petition of A. B. of C—humbly ſheweth (*ſtate all the material circumſtances of the claims or matters in diſpute.*) and your petitioner ſays, that he is wholly without remedy at law, and muſt forever loſe ſaid juſt debt, or claim, unleſs relieved by the interpoſition of your honours, as a court of equity: your petitioner therefore prays your honours to take his caſe into conſideration, and enquire into the truth of the aforeſaid facts, either by yourſelves, or by a commitee, and on their being found true, to order and decree (*ſtate the ſpecific relief deſired.*) or that your honors would in ſome other way, grant ſuch relief, as to your honors ſhall ſeem juſt and reaſonable, and your petitioner as in duty bound ſhall ever pray. Dated, &c.

SUMMONS.

To the ſheriff, &c. By authority of the State of Connecticut, you are hereby commanded to ſummon and give notice to D. E. of F—to appear (if he ſee cauſe) before the ſuperior court to be holden at then and there to ſhew reaſons (if any he have) why the prayer of the foregoing petition of A. B. of C—ſhould not be granted. Fail not &c.